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*Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part I)**

CRAIG H. ALLEN**

I INTRODUCTION

For more than fifty years the United States has played a leading role in efforts at the International Maritime Organization (IMO) to develop, implement, and enforce an effective mandatory international legal regime designed to promote merchant vessel safety and prevent marine pollution by vessels. Those visionary efforts by the United States and other IMO-member nations have produced a vast body of international conventions, protocols, safety codes, and guidance documents which now constitute the generally-accepted international rules and standards with which all merchant vessels must comply. The United States is a party to nearly all of the IMO-sponsored marine safety and pollution prevention conventions and has incorporated most of the rules and standards promulgated by those conventions into its domestic law applicable to United States-flag vessels. In addition, the United States has launched a far-reaching Port State Control Initiative to ensure that foreign vessels entering United States ports or waterways (other than those in innocent or transit passage) comply with the international rules and standards. The United States' decision to adopt and enforce international standards—and to permit foreign vessels complying with international standards to enter United States ports—has not, however, been followed by all of the states within the nation, some of which have enacted local requirements which differ from international standards.

The effect of state initiatives to step-up regulation of merchant vessels entering state waters has recently emerged as a foreign relations challenge

* *Editor's Note:* This is the first part of a multi-part article. Part II will appear in the October 1998 issue of the Journal.

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for the United States. For example, actions by the State of Washington to prescribe state-specific requirements applicable to foreign merchant vessels navigating in state waters have so far drawn diplomatic protests from fourteen nations and the Commission of the European Community.¹ The protest by the EC nations warns that differing regimes in different parts of the United States create uncertainty and confusion and set an "unwelcome precedent" for other federally administered nations.² A 1997 Canadian Government protest bluntly declares that Washington's actions violate an international agreement between the United States and Canada which provides reciprocal transit privileges to vessels navigating the boundary straits between Washington and the Province of British Columbia.³ Yet, in a recent decision turning aside a challenge to the new Washington tanker regulations, the federal district court held that the regulations did not intrude on the federal government's Foreign Relations Clause or Commerce Clause powers.⁴ Nor, the court held, were the state regulations preempted or superseded by any of the numerous federal laws and international agreements which regulate those same vessels.⁵ While the United States Attorney General was considering whether to petition the circuit court of appeals for leave to intervene in the case on appeal, the governor of Washington wrote directly to President Clinton, urging him to direct the Attorney General to remain on the sidelines.⁶ Despite this request, the United States intervened in the appeal, citing in its brief "the immense foreign affairs interests of the United States in the international maritime field."⁷

International conflict over maritime boundaries and other affairs is nothing new in the Pacific Northwest. In 1859, British and American forces stood on the brink of war over a border dispute involving the same boundary straits implicated in the 1997 protest by the Canadian Government.⁸ The two

¹The protesting nations include Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Japan, The Netherlands, Norway, Portugal, Spain, and Sweden. See Note Verbale, Royal Danish Embassy, June 14, 1996 (File No. 60.USA.1/4) (copy on file with the author).

²*Id.* See also Brief for Intervenor-Appellant United States, *International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke*, at 45-46 (9th Cir. No. 97-35010).

³Canadian Embassy, Note No. 0389 (May 7, 1997) (copy on file with the author).

⁴See *International Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1497-99, 1997 AMC 512 (W.D. Wash. 1996), appeal docketed sub. nom. *International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke* (9th Cir. No. 97-35010). The Ninth Circuit heard oral arguments on the appeal on February 4, 1998. The issues in the suit are analyzed by one of the amici curiae attorneys in Coleman, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. Mar. L.J. 305 (1997).

⁵*Intertanko*, 947 F. Supp. at 1493-97.

⁶Letter from Gary Locke, Governor of Washington, to President Bill Clinton (Mar. 24, 1997) (copy on file with the author).

⁷Brief for Intervenor-Appellant United States, *supra* note 2, at 2.

⁸The near-war over the San Juan Islands is described in K. Murray, *The Pig War* (1968).

governments have yet to settle maritime boundary disputes over the waters of the Strait of Juan de Fuca between Oregon and British Columbia and in the Dixon Entrance between British Columbia and Alaska.⁹ Disputes over fishery resources—particularly over northwest salmon stocks—are common, and frequently rancorous. In 1995, the United States Congress condemned, as a violation of international law, a Canadian government decision to impose a fee on United States fishing vessels transiting the Canadian waters of the Inside Passage between Washington and Alaska.¹⁰ The Canadian transit fee was designed to bring pressure on the United States to more earnestly negotiate a new salmon treaty for the region. The 1995 Congressional response sounded ominously close to a threat to use force to protect United States vessels if Canada further interfered with their “right” of innocent passage through the waters of the Inside Passage.¹¹ In the summer of 1997 Congress renewed the threat. In response to protest actions by Canadian fishing vessel operators who blockaded the State of Alaska ferry *Malaspina* during her port call in a Canadian harbor, the United States Senate resolved to call on the President to dispatch United States “assets and personnel” to Canadian waters to protect the “right of innocent passage” of United States citizens through the Canadian territorial sea.¹² The Senate further called on the President to impose retaliatory trade sanctions on Canada and to require all Canadian vessels anchoring in United States waters to submit to United States Customs inspections.¹³ Throughout the fray, the governors of Washington and Alaska carried on their own diplomatic efforts with the Canadian fisheries minister in an attempt to resolve the salmon dispute.¹⁴ Maritime affairs in the Northwest are plainly international affairs; affairs which raise fundamental federalism questions for the nation.

In examining federalism issues relevant to merchant vessels, this article will distinguish between those laws and regulations governing liability for harm¹⁵ and those which regulate safety.¹⁶ Federalism questions arise most

⁹Maritime Affairs: A World Handbook 208–09 (H. Degenhardt et al. eds. 1985).

¹⁰Fisheries Act of 1995, Pub. L. No. 104–43, tit. IV, § 401(1)–(3), 109 Stat. 366 (1995).

¹¹See id. § 401(10)–(12).

¹²See S. Res. 109, 105th Cong., 1st Sess. (1997), and 143 Cong. Rec. S7919 (daily ed. July 23, 1997).

¹³See 143 Cong. Rec. at S7966 (daily ed. July 23, 1997).

¹⁴See, e.g., Talks May Ease Canada-U.S. Fishing Dispute—Northwest Officials, B.C. Minister to Meet, *Seattle Times*, July 30, 1997, at B3.

¹⁵Liability laws include those laws establishing: (1) the bases for liability and any relevant defenses, and, (2) the remedies available. Liability laws derive from legislative or judicial judgments as to the circumstances in which liability will be imposed and the measure of damages. Liability regimes necessarily entail a judgment about the extent to which accident costs should be internalized.

¹⁶Each regime presents a distinct but related approach to addressing the social costs of accidents. As one commentator has observed:

frequently in the former, *private*, maritime law domain, when courts are called upon to determine judicial jurisdiction and the extent to which state law may be applied to adjudicate liability and damages in cases falling within the admiralty and maritime jurisdiction. Less frequently, the federalism debate focuses on *public* maritime law, when states seek to regulate commercial vessel safety or vessel-source pollution.

Federalism in the private maritime law context has been extensively analyzed in several recent articles.¹⁷ Those works point to an unmistakable erosion in the principle of uniformity in private admiralty law in recent Supreme Court decisions. Without questioning the wisdom of the Court's private maritime law decisions,¹⁸ this article will focus on the body of public, "foreign relations laws"¹⁹ applicable to vessels entering United States waters, to determine the extent to which those laws may supersede state law or preempt state authority to regulate the conduct of merchant vessels.

This article will begin with an examination of the constitutional allocation of federal and state powers relevant to regulation of merchant vessel safety and vessel-source pollution prevention. Next, it describes the constitutional limitations on the states' exercise of their police powers, focusing on the "dormant" Commerce Clause doctrine and the Court's preemption and supersession jurisprudence. The article will then examine the principal international conventions and related United States statutes which make up the foreign relations law of the United States that will typically be relevant in a preemption analysis of state merchant vessel safety and pollution prevention laws and regulations. Finally, the article will identify weaknesses

Liability in tort and the regulation of safety represent two very different approaches for controlling activities that create risks of harm to others. Tort liability is private in nature and works not by social command but rather indirectly, through the deterrent effect of damage actions that may be brought once harm occurs. Standards, prohibitions and other forms of safety regulation, in contrast, are public in character and modify behavior in an immediate way through requirements that are imposed before, or at least independently of, the actual occurrence of harm.

Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357, 357 (1984).

¹⁷The leading articles on the subject are: Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 La. L. Rev. 825 (1997); Force, *Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity, Whither Goest Thou?*, 21 Tul. Mar. L.J. 7 (1996); Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. Mar. L. & Com. 325 (1995). See also Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158.

¹⁸For the critical comments of two prominent federal admiralty judges, see Haight, *Babel Afloat: Some Reflections on Uniformity in Maritime Law*, 28 J. Mar. L. & Com. 189 (1997), and Hughes, *An Introduction: Principles and Pragmatism*, 21 Tul. Mar. L.J. 1 (1996).

¹⁹"Foreign relations law" includes: (1) international law as it applied to the United States, and, (2) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences. See Restatement (Third) Foreign Relations Law of the United States § 1 (1987). "Public" law (sometimes described as laws governing "primary conduct") is about legislative competence to prescribe and jurisdiction to enforce laws to effect safety goals.

in the current approach to analyzing preemption challenges, propose a new approach and apply the new approach to issues raised by state regulation of merchant vessel construction, design, equipment, or manning, merchant vessel operations, and vessel-source polluting discharges or emissions.

II

ALLOCATION OF AUTHORITY TO REGULATE MERCHANT VESSEL SAFETY AND POLLUTION PREVENTION

Early advocates debating how best to allocate authority between the federal and state governments under the proposed Constitution recognized the pervasive national interest in foreign affairs and commerce. Writing in *The Federalist* No. 11, Alexander Hamilton highlighted the importance to the new nation of a strong navy and merchant marine and the pivotal role that a “vigorous national government” would play in promoting them.²⁰ In justifying the constitutional limitations on the states in matters affecting foreign affairs, James Madison cited “the advantage of uniformity in all points which relate to foreign powers.”²¹ John Jay, who had served as Secretary of Foreign Affairs during the Articles of Confederation period, observed that “there are few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it.”²² Not surprisingly, the Constitution the Federalist-dominated Founders drafted allocated the nation’s foreign affairs and foreign and interstate commerce powers to the national government. Nevertheless, persistent federalism questions relating to maritime commerce have divided the Republic since its birth, as incisively framed by Chief Justice Marshall’s decision in *Gibbons v. Ogden*.²³ Regrettably, there is still little agreement about the constitutionally proper federal and state roles in regulating merchant vessels engaged in interstate or foreign commerce. To understand this ongoing conflict—and to find our way out of the dissipating jurisdictional struggles it engenders—we must begin with an analysis of the federal Commerce Clause and Foreign Relations powers, the federal Admiralty and Maritime Jurisdiction, the nature of the states’ reserved powers, and the Supremacy Clause and its offspring, the preemption doctrine.

²⁰The Federalist No. 11 (Alexander Hamilton).

²¹The Federalist No. 44 (James Madison).

²²The Federalist No. 64 (John Jay).

²³22 U.S. (9 Wheat.) 1 (1824) (holding that New York’s steamboat “monopoly” was preempted by a federal vessel licensing statute).

A. Federal Authority Over Merchant Vessel Safety and Pollution Prevention

The federal government is widely understood to be one of limited express powers.²⁴ Congress has no inherent legislative power; it can legislate only with respect to those subjects over which it has expressly been given jurisdiction by the Constitution. The most frequently cited constitutional bases for federal maritime legislation are the Commerce Clause, the Admiralty Clause and, more recently, the Foreign Affairs Clause. The authority granted to the federal government by those sources, together with the gloss added by the Necessary and Proper Clause,²⁵ is so broad that it now seems unthinkable that a court would find that an act of federal legislation governing maritime commerce was enacted without jurisdiction.²⁶ The authority of the Executive Branch and the federal judiciary in matters of maritime commerce is similarly broad.

1. The Federal Interstate and Foreign Commerce Power

The Constitution allocates to the federal government the power to regulate commerce with foreign nations and among the several states.²⁷ The Commerce Clause provides authority for the federal government to regulate not only the commerce itself,²⁸ but also the highways of commerce, including the navigable waterways;²⁹ the instrumentalities of commerce,

²⁴See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1990) (quoting *The Federalist* No. 45).

²⁵U.S. Const. art. I, § 8, cl. 18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“[I]f the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”).

²⁶See D. Robertson, *Admiralty and Federalism* 136–47 (1970) [hereinafter *Admiralty and Federalism*]. Other constitutional provisions may, however, limit the federal government. See, e.g., U.S. Const. art. I, § 9, cl. 5 (“No tax or duty shall be laid on articles exported from any State.”) and cl. 6 (“No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.”).

²⁷U.S. Const. art. I, § 8, cl. 3.

²⁸The Constitution itself places few express limits on the federal commerce power. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981) (holding that “[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding.”). Later, however, the Supreme Court limited the federal commerce power in two respects. First, the Court held that the Congress’ Commerce Clause powers over matters “affecting” commerce are not unlimited. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“the powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and undefined.”) (quoting *The Federalist* No. 45). Second, the Court held that the Commerce Clause does not empower Congress to conscript the states into implementing federal law. *Printz v. United States*, 117 S. Ct. 2365 (1997).

²⁹See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (upholding application of federal steamboat

including commercial vessels;³⁰ and activities which, though facially intra-state, may "affect" interstate or foreign commerce.³¹

Legislative power over commerce is concurrent in many respects with the state police power.³² However, the states' role in regulating foreign commerce is restricted. Foreign commerce is preeminently a matter of national concern.³³ Owing to the need for the nation to speak with "one voice" in its foreign commercial relations,³⁴ the Supreme Court has characterized Congress' power over foreign commerce as "exclusive and absolute."³⁵ The Tenth Amendment does not limit the federal government's foreign commerce powers.³⁶ In its analyses of state taxation of instrumentalities engaged in foreign commerce, the Court has expressed particular concern for oceangoing traffic.³⁷ The Court has, in fact, articulated a presumption that such vessels will be regulated by the federal government.³⁸ The Court's concern over the effect of state taxation of instrumentalities of foreign commerce focuses on the potential for frustration of federal uniformity and the possibility of retaliation by aggrieved nations.³⁹

inspection laws to vessels plying the navigable waters of the United States within the boundaries of a single state), and *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1866) (holding that the commerce power includes the power to regulate navigable waters). Federal statutes and regulations governing the navigable waters of the United States are contained in Title 33 of the United States Code and the Code of Federal Regulations.

³⁰See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (holding that the power to legislate commerce includes competence to regulate vessels as instrumentalities of commerce).

³¹See *Wickard v. Filburn*, 317 U.S. 111 (1942). Cf. *Lopez*, 514 U.S. at 559-61 (distinguishing *Wickard* as a case involving interstate "economic activity").

³²Congress does not possess a police power, as do the states; however, "in the exercise of its control over interstate commerce, the means employed by Congress may have the quality of police regulations." *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, 346-47 (1937).

³³See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 1979 AMC 881 (1979). Although the Constitution grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, "there is evidence that the Founders intended the scope of the foreign commerce power to be greater." *Id.* at 448 (citing, *inter alia*, *The Federalist* No. 42).

³⁴See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976).

³⁵*Id.* See also *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904).

³⁶See *Japan Line*, 441 U.S. at 448 n.13 ("It has never been suggested that Congress' power to regulate foreign commerce would be limited" by the Court's holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

³⁷See *id.* at 449.

³⁸See *id.* ("vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by national legislation.") (quoting *Railroad Co. v. Maryland*, 88 U.S. (21 Wall.) 456, 470 (1875)).

³⁹See *id.* at 450.

2. The Federal Admiralty and Maritime Jurisdiction Power

The Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction."⁴⁰ Together with the Necessary and Proper Clause, the Admiralty Clause provides the constitutional authority for federal courts and the Congress to create and modify a body of federal maritime law for the nation.⁴¹ The general maritime law, received by the United States and developed by the federal courts, is "federal" law, and therefore prevails over any contrary state law by virtue of Article VI of the Constitution.⁴² As with its power under the Commerce Clause, Congress has the power under the Admiralty Clause to preempt the entire field of maritime law;⁴³ but Congress has not done so.⁴⁴ As a result, state law may serve an important role in admiralty, occasionally providing the rule of decision governing remedies⁴⁵ and, perhaps, liability.⁴⁶

Congress has largely left development of admiralty law to the courts.⁴⁷

⁴⁰U.S. Const. art. III, § 2.

⁴¹See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360–61, 1959 AMC 832 (1959) (the Admiralty Clause "empower[s] the federal courts . . . to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' . . . and to continue the development of this law within constitutional limits.") (quoting *Crowell v. Benson*, 285 U.S. 22, 55, 1932 AMC 355 (1932)); A. Ehrenzweig, *Private International Law* 40–41 (1967); Admiralty and Federalism, *supra* note 26, at 142–44 & n.42 (observing that the Admiralty Clause, coupled with the Necessary and Proper Clause, is the principal basis for Congress to legislate admiralty law); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 Harv. L. Rev. 1214 (1954).

⁴²See *Kossick v. United Fruit Co.*, 365 U.S. 731, 739, 1961 AMC 833 (1961); Currie, *supra* note 17, at 166 ("even when there is no maritime rule, the Admiralty Clause itself has a preemptive, negative effect on state law similar to that of the Commerce Clause."). In his famous dissent in *Jensen*, Justice Holmes disagreed. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 220–23, 1996 AMC 2076 (1917) (Holmes, J., dissenting) ("it is too late to say that mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law.").

⁴³See *Oil, Chemical & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 434–35 (1976) (Stewart & Rehnquist, JJ., dissenting).

⁴⁴Congress also has the power to make judicial jurisdiction over admiralty and maritime cases exclusively federal, but has elected instead to confer concurrent jurisdiction over *in personam* admiralty cases on state courts. See 28 U.S.C. § 1333(1) and *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867) (holding that the saving to suitors clause in 28 U.S.C. § 1333 does not permit *in rem* actions to be brought in state court).

⁴⁵See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996) (holding that a state wrongful death statute was not preempted in a suit to recover for the death of a recreational boater in the territorial sea).

⁴⁶*Cf. id.* at 216 n.14 (intimating that in a proper case state law may provide the rule of decision governing liability). But see *Belden v. Chase*, 150 U.S. 674 (1893) (holding that the federal rules of navigation preempt state law). Judge Haight notes that the maritime personal injury bench and bar has found the passage in *Yamaha* astonishing. Haight, *supra* note 18, at 201–02. The Court's inconsistency in its choice of law analysis is analyzed in Friedell, *supra* note 17, at 828–32.

⁴⁷See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 1963 AMC 1093 (1963). But see *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27, 1991 AMC 1 (1990) (holding that "Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

Beginning with the writings of Justice Joseph Story⁴⁸ at the turn of the 19th Century, Federalist thinking shaped the early development of the admiralty and maritime jurisprudence. Recognizing the far-reaching international implications of admiralty law in the United States, Justice Story concluded that "the admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations, and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic."⁴⁹ Judicial recognition of the primacy of the federal interest in development of the admiralty law reached its zenith shortly after the turn of the 20th Century, when the Supreme Court, in response to state initiatives to provide greater protection to maritime workers, struck down state laws (and a revised federal "saving to suitors" clause in the admiralty jurisdiction statute) which the Court concluded would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations."⁵⁰

It is often said that—outside of the admiralty jurisdiction—federal law is interstitial,⁵¹ filling actual or perceived gaps in state statutory and common law.⁵² Within the admiralty jurisdiction, however, it is state law—not federal law—which has historically been viewed as interstitial.⁵³ Admiralty draws on the ancient general maritime law, as modified by the Congress or the federal courts. Over a half-century ago the Supreme Court identified a "reverse-*Erie*" doctrine,⁵⁴ which acts to displace application of state law in

⁴⁸See, e.g., *De Lovio v. Boit*, 7 F. Cas. 418, 1997 AMC 550 (C.C.D. Mass. 1815) (No. 3,776), and J. Story, *Commentaries on the Constitution of the United States* §§ 1657–1667 (1833).

⁴⁹Story, *supra* note 48, at § 1666 (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816)). See also *id.* at § 1664.

⁵⁰*Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216, 1996 AMC 2076 (1917) (holding that New York State's workers' compensation statute could not be applied to a longshoreman whose injury claim fell within admiralty jurisdiction). See also *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163–64 (1920), and *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227–28, 1924 AMC 403 (1924).

⁵¹P. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 533 (3d ed. 1988) ("Federal law is generally interstitial in nature. It rarely occupies a legal field completely.").

⁵²As Professors Hart and Wechsler have observed, on the whole federal legislation has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

Id.

⁵³G. Gilmore & C. Black, *The Law of Admiralty* § 1–17, at 49 (2d ed. 1975). But see *Jensen*, 244 U.S. at 220 (Holmes, J., dissenting) ("The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea.").

⁵⁴*Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 1986 AMC 2113 (1986) ("the 'saving to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called

matters falling within federal admiralty jurisdiction but heard in state courts under the saving to suitors clause.⁵⁵ Indeed, some have argued in favor of a presumption that state law is displaced in cases falling within the admiralty and maritime jurisdiction.⁵⁶ But such a presumption is unlikely to garner much support among the current members of the Court, who seem unwilling even to reconcile the Court's recent decisions with a body of well-established precedents.⁵⁷ The trend in Supreme Court decisions now points toward much greater diversity in choice of law in private admiralty cases. The long-held article of faith among the admiralty bar that "with admiralty jurisdiction comes application of substantive admiralty law,"⁵⁸ would find at best an agnostic reception among a majority of the current Supreme Court⁵⁹—at least unless that phrase "substantive admiralty law" subsumes

'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.") (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 1942 AMC 1645 (1942)). See also Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L.J. 81 (1996).

⁵⁵28 U.S.C. § 1333(1).

⁵⁶See, e.g., Peltz, *The Myth of Uniformity in Maritime Law*, 21 Tul. Mar. L.J. 103, 130 (1996) ("unlike Commerce Clause analysis, the preemption test under the Admiralty Clause should start with the proposition that there is a presumption in favor of preemption as to all matters falling within admiralty jurisdiction.").

⁵⁷See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 n.8, 1996 AMC 305 (1996) ("[w]e attempt no grand synthesis or reconciliation of our precedents today"), and *American Dredging Co. v. Miller*, 510 U.S. 443, 452, 1994 AMC 913 (1994) ("[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.").

⁵⁸*East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 1986 AMC 2027 (1986). In construing the Admiralty Clause, the Supreme Court concluded that

[o]ne thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed. . . .

The Lottawanna, 88 U.S. (21 Wall.) 558, 575, 1996 AMC 2372 (1875).

⁵⁹See, e.g., *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545–46, 1995 AMC 913 (1995), stating in dictum that the

exercise of admiralty jurisdiction does not result in automatic displacement of state law. It is true that "with admiralty jurisdiction comes the application of substantive admiralty law." But to characterize that law . . . as "federal rules of decision" is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads into a harmonious system. But this limitation still leaves the States a wide scope.

(citations omitted). See also *Yamaha*, 516 U.S. at 206–16 & nn.8 & 13. The retreat from uniformity was first signaled in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 1955 AMC 467 (1955) (holding that, although marine insurance contracts fall within admiralty jurisdiction, state law governs in the absence of a judicially established admiralty rule governing the question or a need to fashion a federal rule). For a comparison with Canadian law, which remains faithful to the principle of uniformity in the maritime law, see *Ordon Estate v. Grail*, 1997 AMC 418, 433–35 (Ontario C.A. 1996).

an as yet undefined quantum of state law. It thus now appears that if uniformity is to continue to be a characteristic feature of private maritime law, it will be Congress, not the Supreme Court, who will be the author of the doctrine.⁶⁰

3. *The Federal Foreign Affairs Powers*

The Founders considered the prudent exercise of foreign affairs powers critical to the nation's success.⁶¹ The unhappy experience under the Articles of Confederation revealed that states had so often violated the nation's international law obligations that the files of Congress "contain complaints already, from almost every nation with which treaties have been formed."⁶² In enumerating the defects in the Articles, Edmund Randolph's first complaint was that under the Articles the national government "could not cause infractions of treaties or of the law of nations to be punished."⁶³ The Constitution the Founders drafted plainly sought to correct the weaknesses in the Articles' failed scheme for the conduct of foreign affairs. It did so by lodging the foreign affairs powers of the United States solely in the federal government.⁶⁴ Indeed, as a "federal state," the United States constitutes a single entity in the eyes of international law.⁶⁵ Power over external relations is not shared with the states,⁶⁶ and will not likely be shared in the future.⁶⁷

⁶⁰Some might conclude that the federal bench has become frozen in the headlights of *Erie*, reticent to further develop a body of judge-made or judge-declared federal law—even in admiralty cases, where *Erie* is irrelevant. Cf. Brown, Admiralty Judges: Flotsam on the Sea of Maritime Law?, 24 J. Mar. L. & Com. 249 (1993), and Kimball, Miles: "This Much and No More . . .", 25 J. Mar. L. & Com. 319 (1994) ("instead of acknowledging the Court's constitutional function of declaring the admiralty and maritime law and ensuring uniformity in that body of law, the [Miles] opinion relegates the Court to an inferior role to that of Congress.").

⁶¹See The Federalist No. 64 (John Jay) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce.").

⁶²June 19, 1787 Statement by James Madison to Committee of the Whole, reprinted in J. Madison, Notes of Debates in the Federal Convention of 1787, at 142 (Ohio Univ. Press ed. 1966). See also Story, supra note 48, at § 1054 (The Continental "Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless.").

⁶³Madison, supra note 62, at 28.

⁶⁴Restatement, supra note 19, at § 201 cmt. g & n.9.

⁶⁵See Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 2, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

⁶⁶See U.S. Const. art. I, § 10; United States v. Pink, 315 U.S. 203, 233 (1942); Restatement, supra note 19, at § 1 n.5. See generally Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int'l L. 821 (1989), and Fenton, The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions, 13 Nw. J. Int'l L. & Bus. 563, 564 n.1 (1986) (summarizing state and local government regulations directed at foreign affairs interests).

⁶⁷L. Henkin, Foreign Affairs and the U.S. Constitution 149–50 (1996) [hereinafter cited as Foreign Affairs] ("[r]evolution in the national mood in the 1990s has tended to seek to take from the federal

Nor does the Tenth Amendment limit the federal government's foreign affairs powers.⁶⁸

The Constitution ensures the primacy of the federal government in the nation's foreign relations through two provisions.⁶⁹ It first provides that only the President shall have the power, by and with the advice and consent of the Senate, to make treaties.⁷⁰ Article VI of the Constitution then provides that such treaties (and the Constitution and the Laws of the United States) are the supreme "Law of the Land,"⁷¹ and prevail over, or preempt, state and local enactments. This supremacy of the federal government's power over foreign affairs has been given "continuous recognition" by the Supreme Court.⁷²

Each of the branches of the federal government plays an important role in the development of conventional international law governing merchant shipping.⁷³ The President participates in the development of international conventions establishing vessel safety and pollution prevention rules and standards and, with the advice and consent of the Senate, binds the nation to those conventions by ratification or accession followed by proclamation.⁷⁴ The President may, with the Senate's consent, enter into bilateral treaties of

government and give to the states, but this trend is not likely to have [an] impact on foreign affairs."). As Madison argued, the constitutional limitation on the states' role in foreign affairs is justified by the need for "immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible." *The Federalist* No. 44 (James Madison).

⁶⁸In reserving powers to the states or to the people, the Tenth Amendment refers only to those "powers not delegated to the United States by the Constitution." The foreign relations powers are delegated solely to the federal government. See *Missouri v. Holland*, 252 U.S. 416, 432-35 (1920) (Holmes, J.) (dictum). Federal legislation which would have subordinated the federal foreign affairs power to the Tenth Amendment was considered by the Congress in 1953, but failed to pass. See S.J. Res. 1, 83d Cong. (1953), 99 Cong. Rec. 6777 (1953) (the proposed "Bricker Amendment").

⁶⁹In 1936 the Supreme Court examined the constitutional basis for the federal foreign relations power and its roots in the inherent sovereign nature of the nation-state and concluded that "the investment of the federal government with the powers of external sovereignty did not depend on the affirmative grants of the Constitution." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (dictum). The Court's decision is criticized in Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L.J.* 467 (1946).

⁷⁰U.S. Const. art. II, § 2, cl. 2. States, by contrast, are expressly precluded from entering into treaties. *Id.* art. I, § 10, cl. 1.

⁷¹*Id.* art. VI, cl. 2.

⁷²*Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (citations omitted). The Court elaborated on the doctrine in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), holding that the preemption analysis turns on three factors: 1) the pervasiveness of the federal regulatory scheme; 2) whether the need for national uniformity necessitates that the federal government occupy the field; and, 3) the danger of a conflict between the federal program and the state laws under examination. *Id.* at 502-05.

⁷³"Conventional" international law includes all international agreements to which a State is party. Conventional international law is generally binding only on States-parties. See Restatement, *supra* note 19, at §§ 102(3) & 301.

⁷⁴The United States is represented at the IMO by delegates from the Department of State, the Coast Guard, the National Oceanic and Atmospheric Administration, and the Department of Defense. See Brief for Intervenor-Appellant United States, *supra* note 2, at 12.

"friendship, commerce and navigation" to facilitate trade with other nations. Conventions and treaties may be self-executing, requiring no domestic legislation or regulations to implement them. Where a treaty is not self-executing, Congress must first implement its terms before the treaty becomes a part of United States domestic law. In such cases Congress may draw legislative authority from the treaty itself.⁷⁵ The President may also enter into Executive Agreements with other nations.⁷⁶ Such international agreements, often representing a presidential *quid pro quo*,⁷⁷ bind the nation even without Senate advice and consent.⁷⁸ Executive Agreements may be grounded on congressional consent,⁷⁹ or solely on the President's inherent powers, including those powers derived from his position as Commander-in-Chief.⁸⁰ In implementing some international conventions to which the United States is party, Congress has authorized the President to bind the nation to subsequent amendments to the convention without prior Senate approval.⁸¹ Federal courts also play an important role in applying conventional international law in individual cases. International law is "federal law," the content and meaning of which is determined by the federal courts. The courts's determinations are binding on the states.⁸²

All three branches of the federal government also play important roles in the development of customary international law.⁸³ The President is bound to take care that "the Laws" be faithfully executed.⁸⁴ Such "laws" include

⁷⁵See *Missouri v. Holland*, 252 U.S. 416 (1920), and Restatement, *supra* note 19, at § 111 & cmt. j.

⁷⁶See Restatement, *supra* note 19, at § 303, and Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 *Yale L.J.* 345 (1965).

⁷⁷See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

⁷⁸Restatement, *supra* note 19, at § 303(4) & cmt. g.

⁷⁹For example, the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1230(b), authorizes and encourages the President to enter into "executive agreements" with adjacent nations "to establish comparable vessel standards and vessel traffic services." Similarly, the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), provided the legislative complement to the President's Executive Agreement binding the United States to the Uruguay Round Agreements' establishment of the World Trade Organization.

⁸⁰Restatement, *supra* note 19, at § 1 n.2 ("In foreign affairs . . . the President is clearly a separate source of law."). Such agreements are referred to as "sole" executive agreements.

⁸¹See, e.g., 33 U.S.C. § 1602(c) & (d) (authorizing the President to implement by proclamation subsequent amendments to the 1972 Convention on International Regulations for Preventing Collisions at Sea, unless Congress earlier expresses its disapproval of the proposed amendments).

⁸²See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964). But see *infra* note 308 (opinion of commentators who argue otherwise).

⁸³Customary international law denotes the body of law which results from a general and consistent practice of States followed by them from a sense of obligation. Restatement, *supra* note 19, at § 102(2) & cmt. b. See also A. Hollick, *U.S. Foreign Policy and the Law of the Sea* 11-13 (1981) (pointing out that "the major innovations in the law of the sea—the concepts of the 200 mile zone and the continental shelf—can both be traced to the U.S.").

⁸⁴U.S. Const. art. II, § 3.

customary and conventional international law.⁸⁵ The President has "plenary and exclusive power" to act as the "sole organ" of the federal government in the field of international relations.⁸⁶ It is, therefore, the President who most often asserts or opposes international law claims, and who must answer for any alleged violation of international law by the United States or its state and local governments.⁸⁷ Beginning with Secretary of State Thomas Jefferson's assertion, on behalf of President Washington, of the nation's claim to a three nautical mile territorial sea in 1793,⁸⁸ the Executive Branch has taken the lead in establishing United States foreign policy (and customary international law) relating to the law of the sea, including its provisions regarding shipping and navigation rights. In 1945, President Truman vastly extended United States claims over resources in the adjacent ocean when he proclaimed United States jurisdiction over the resources of the continental shelf.⁸⁹ In 1983, President Reagan proclaimed a United States Exclusive Economic Zone (EEZ) extending seaward 200 nautical miles from the United States coast, while concomitantly reassuring the community of nations that the United States would continue to respect traditional high seas navigation rights and grant foreign vessel access to the new EEZ for marine scientific research.⁹⁰ In 1988, President Reagan again shaped United States

⁸⁵See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination.").

⁸⁶See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (dictum), and *Restatement*, supra note 19, at § 326.

⁸⁷*Foreign Affairs*, supra note 67, at 233-34. In *Edye v. Robertson*, the Supreme Court noted that: A treaty is primarily a compact between independent Nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which in the end may be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights on the citizens or subjects of one of the nations residing in the territorial limits of the other, which partakes of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. 112 U.S. 580, 598 (1884).

⁸⁸Letter from Thomas Jefferson, United States Secretary of State, to George Hammond, British Minister, Nov. 8, 1793, reprinted in H.R. Exec. Doc. No. 324, 42d Cong., at 553-54 (1872). John Marshall and Joseph Story both later viewed the territorial sea premised upon this proclamation as part of the territory of the United States. See *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall, C.J.); *The Ann*, 1 F. Cas. 926, 926-27 (C.C.D. Mass. 1812) (No. 397) (Story, J.); J. Moore, *Digest of International Law* 699-703 (1906).

⁸⁹See Presidential Proclamation No. 2667 (1945), 3 C.F.R. pt. 67 (1943-48 Comp.); 13 Dep't State. Bull. 484-85 (1945); Hollick, supra note 83, at 54 ("The relative absence of direct congressional participation in the events immediately leading up to the Truman Proclamation is a striking example of executive domination of foreign policy during wartime.").

⁹⁰See Presidential Proclamation No. 10605 (1983), 48 Fed. Reg. 5030 (1983), and Statement Accompanying Proclamation of Exclusive Economic Zone, 19 Weekly Comp. Pres. Docs. 383 (1983), reprinted in 22 I.L.M. 461, 464 (1983).

ocean policy when he proclaimed a twelve nautical mile territorial sea, while reaffirming the nation's commitment to preserving the right of innocent passage through the territorial sea and transit passage through international straits.⁹¹

Congress too has played an important role in developing customary international law through its legislation asserting United States claims to ocean uses. In 1976, Congress enacted the Fishery Conservation and Management Act,⁹² establishing a United States Fishery Conservation Zone extending 200 nautical miles seaward. Congress and federal agencies consider international law and foreign policy considerations in drafting statutes and regulations. Moreover, they frequently include provisions in maritime laws or regulations preserving international law freedoms, expressing an intent that the statute is to be construed and applied in a manner consistent with international law, or extending reciprocity to foreign vessels which meet international rules and standards.⁹³

Since its earliest days, the United States has shown its resolve to take diplomatic or military action to preserve its ocean policy objectives. From President Jefferson's reprisals against the Barbary Pirates in 1801, to the War of 1812, brought on by British boardings of United States merchant vessels at sea and impressment of United States merchant seamen, the United States demonstrated its commitment to the preservation of high seas freedoms. In response to Cambodia's seizure in 1975 of the United States merchant vessel *Mayaguez* while the vessel was in innocent passage seven miles from the nearest land, President Ford condemned the action as a violation of international law and ordered United States forces to recapture the vessel.⁹⁴ The United States Navy has carried out a "freedom of navigation" program since 1979,⁹⁵ challenging excessive claims by other

⁹¹Presidential Proclamation No. 5928 (1988), 54 Fed. Reg. No. 5 (1989).

⁹²Pub. L. No. 94-265, 90 Stat. 331 (1976).

⁹³See, e.g., 33 U.S.C. § 1223(d) (exempting vessels in innocent passage or transit passage from certain requirements under the Port and Waterways Safety Act of 1972); 33 U.S.C. § 1509(a) (deepwater port regulations are "subject to recognized principles of international law"); 33 C.F.R. § 164.02 (exempting foreign vessels in innocent passage or transit passage from navigation safety regulations); 46 U.S.C. § 3303 (extending reciprocity to foreign vessels other than tankers); 46 U.S.C. § 3702(e) (exempting foreign tankers in innocent passage from chapter); 46 U.S.C. § 3711 (recognizing foreign tank vessel compliance certificates); 46 U.S.C. § 5109 (load line reciprocity for foreign vessels); 46 U.S.C. § 9101(a) (Secretary to determine whether foreign tank vessel's flag state standards for manning, training, qualification, and watchkeeping are at least equivalent to United States or international standards); 46 U.S.C. § 14306 (tonnage measurement reciprocity for foreign vessels).

⁹⁴See [1975] Digest of Practice in International Law 423, and Note, *The Mayaguez: The Right of Innocent Passage and the Legality of Reprisal*, 13 San Diego L. Rev. 765 (1976).

⁹⁵Gist, U.S. Freedom of Navigation Program (Dec. 1988) (U.S. Dep't of State), reprinted in *Annotated Supplement to the Commanders' Handbook of the Law of Naval Operations*, pt. I, at 2-67 to 2-68 (1997).

nations over ocean waters. President Reagan's 1983 Ocean Policy Statement reaffirmed that "the United States will exercise and assert its navigation and overflight rights and freedom on a worldwide basis" in a manner consistent with the 1982 United Nations Convention on the Law of the Sea.⁹⁶ More recently, Congress has twice condemned Canada's alleged violation of the right of United States vessels to engage in innocent passage through the Canadian waters of the Inside Passage, in both cases expressing its apparent willingness to use force if necessary to preserve those rights.⁹⁷

B. The State Police Power Authority

State governments possess broad, inherent legislative power.⁹⁸ Any governmental powers not prohibited by the United States Constitution⁹⁹ (or by the state's constitution) are reserved to the states, or to the people.¹⁰⁰ The powers thus reserved to the states by the Tenth Amendment include the so-called "police power" to prescribe regulations "to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."¹⁰¹ Not surprisingly, the states' broad reserved powers often overlap with the federal government's Commerce Clause and Foreign Relations Clause powers, giving rise to recurring federalism issues.

In some areas of governmental competency the states are said to enjoy a position of sovereignty.¹⁰² Commonly cited arguments for the system of dual-sovereignty inherent in United States federalism include its capacity to facilitate legislative experimentation among the states, to promote local autonomy and accountability, and the need for local expertise in certain legislative areas.¹⁰³ In other areas, such as in foreign affairs or foreign

⁹⁶See *supra* note 90 (Statement Accompanying Proclamation of Exclusive Economic Zone).

⁹⁷See *supra* notes 10–11 and accompanying text.

⁹⁸*Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) (quoting *The Federalist* No. 45).

⁹⁹Constitutional limits include, for example, those enumerated in Article I, § 10 of the Constitution and certain of the amendments forming the Bill of Rights, selectively incorporated into the Due Process Clause of the Fourteenth Amendment.

¹⁰⁰U.S. Const. *amdt.* X.

¹⁰¹*Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

¹⁰²See Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* 15–16 (1992) (defining three forms of "dual sovereignty": (1) state powers not subject to preemption; (2) direct and positive conflict between state and federal laws; and, (3) administrative or judicial ruling precluding preemption), and R. Berger, *Federalism: The Founders' Design* 48–76 (1987) (surveying historical sources relevant to the question of state sovereignty under the Constitution).

¹⁰³*Gregory*, 501 U.S. at 458–59; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Marcus, Louis D. Brandeis and the Laboratories of Democracy, *in* *Federalism and the Judicial Mind* 75–91 (H. Scheiber ed. 1992). For a contrary view, see Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. Legal Stud.* 593 (1980).

commerce, state competency is denied or restricted under the Constitution.¹⁰⁴ State authority in the field of maritime affairs is limited by certain express constitutional prohibitions. For example, the states may not impose duties on tonnage or on imports or exports.¹⁰⁵ Although states are prohibited from concluding treaties, they may, with the consent of Congress, enter into compacts or agreements with sister states or foreign nations.¹⁰⁶ Such regional cooperation in marine pollution prevention and response through bi-state or multi-state agreements has become common, particularly in the West,¹⁰⁷ where multi-state organizations have been formed to develop regional approaches to oil spill prevention and response.¹⁰⁸

The inherent police power is the most often cited basis for state legislation affecting maritime matters.¹⁰⁹ The police power extends to any matter affecting the health, peace, education, safety, or morals of those within the state.¹¹⁰ Commentators have observed that the scope of the state police power is at best poorly defined.¹¹¹ In fact, a persuasive argument can be made from an examination of the leading cases that the scope of the states'

¹⁰⁴*United States v. Pink*, 315 U.S. 203, 233 (1942) ("We repeat that there are limitations on the sovereignty of States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared with the States; it is vested in the national government exclusively.").

¹⁰⁵U.S. Const. art. I, § 10, cls. 2 & 3. Congress may authorize states to impose such duties, and state duties on imports and exports are permissible if "absolutely necessary for executing [state] inspection laws." *Id.* cl. 2. The "inspection laws" referred to are those concerning inspection of *goods*, not of *vessels*. See *infra* note 138 and *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 263, 1936 AMC 1 (1935) (holding that state may charge reasonable fees for services rendered).

¹⁰⁶U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power.").

¹⁰⁷See, e.g., Cal. Gov't Code § 8670.9 (directing state Oil Spill Administrator to "enter into discussion on behalf of the state with the states of Alaska, Oregon and Washington for the purpose of developing an interstate compact regarding oil transport by tanker or barge" and to "coordinate the development of the interstate compact with the Coast Guard, the Province of British Columbia in Canada, and the Republic of Mexico."); Or. Rev. Stat. § 468B.340(2)(c) (Oregon Legislature declares its intent to promote a "consistent west coast approach to oil spill prevention and response."); Tex. Nat. Res. Code § 40.301 (authorizing commission to participate in "initiatives to develop multi-state and international standards.").

¹⁰⁸One such organization, the States-British Columbia Oil Spill Task Force, includes representatives from California, Oregon, Washington, and Alaska and the Province of British Columbia. See further <www.env.gov.bc.ca/eeb/taskfor/tfhome.htm>.

¹⁰⁹See, e.g., *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (holding that a state may require, under authority of its police power, that a vessel's master make certain reports).

¹¹⁰*Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

¹¹¹Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 701 n.51 (1974) ("Though the Constitution does not use the term, states are often said to have a general 'police power.' The term refers simply to a general governmental power, and its use means only that nothing in the United States Constitution requires that state governments possess only 'few and defined powers.'").

police powers is indeterminate.¹¹² As Professor Ely found in 1974,¹¹³ the courts have not articulated a rule or standard for determining the scope of the states' historic police powers, nor do they appear to question seriously whether any particular state act under challenge falls within the undefined power. An approach that casts state police powers as indeterminate is not helpful, and may in fact skew the court's preemption analysis if a presumption against preemption is accorded to such legislation without careful inquiry. That the states' police powers are limited is beyond reasonable dispute. The states' police powers cannot, for example, be greater than the powers reserved to the states by the Tenth Amendment. It follows, therefore, that they cannot include any powers delegated solely to the federal government or expressly denied to the states. Nor, it will be seen, can those powers include subjects which are national in their nature or require uniform national regulation.

Although there has long been a dispute as to whether the states have the power to "directly" regulate maritime commerce, it is now beyond dispute that in the exercise of its police power a state may establish rules applicable on land and water within its limits, even though those rules "incidentally affect maritime affairs."¹¹⁴ In 1937, in *Kelly v. Washington ex rel. Foss Co.*,¹¹⁵ the Supreme Court upheld a Washington state statute regulating motor tug boats engaged in interstate and foreign commerce against a preemption challenge, but only after distinguishing between the nature of the state's police power and the federal Commerce Clause authority. The Court observed that when

the state is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the state to exclude diseased persons, animals, and plants. These are not the proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce.¹¹⁶

¹¹²See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 542 (1947) ("Other law terms like 'police power' are not symbols at all but labels for the results of the whole process."). Whether a state law falls within the ambit of its police powers can be crucial in any preemption analysis. In *Rice v. Santa Fe Elevator Corp.*, a case concerning a preemption challenge to an Illinois statute purporting to regulate federally licensed grain storage warehouses, Justice Douglas' majority opinion observed that regulation of grain warehouses was a field which the States have "traditionally occupied." 331 U.S. 218, 230 (1947). Accordingly, Justice Douglas wrote, "we begin with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

¹¹³Ely, *supra* note 111.

¹¹⁴*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 339, 1973 AMC 811 (1973).

¹¹⁵302 U.S. 1, 1937 AMC 1490 (1937).

¹¹⁶*Id.* at 14.

The Court thus concluded that because unseaworthy tugs are not considered proper instrumentalities of interstate or foreign commerce the states were constitutionally competent to impose certain limited requirements on them—at least until the federal government enacted legislation establishing safety standards for those vessels.

In a 1960 decision examining a city ordinance regulating air emissions from federally licensed and inspected vessels, the Court, in *Huron Portland Cement Co. v. City of Detroit*,¹¹⁷ noted that legislation “designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”¹¹⁸ In 1978, the Court again invoked the familiar presumption against preemption of the states’ “historic police powers” in *Ray v. Atlantic Richfield Co.*,¹¹⁹ a case involving a challenge to state regulation of tank vessel design, equipment, size limits, and operating requirements. In *Ray*, the Court did not even question whether the state tanker regulations fell within the ambit of the states’ historic police powers—the factual predicate for applying the presumption against preemption—nor did it articulate a test for making such an evaluation.

III

CONSTITUTIONAL LIMITS ON STATE REGULATION OF MERCHANT VESSELS

Notwithstanding the broad reach of the states’ police power, state regulation of merchant vessel safety and pollution prevention is constrained by three constitutional principles.¹²⁰ First, because merchant vessels are instrumentalities of commerce, their regulation is governed by the Commerce Clause, including the implied “negative” or “dormant” Commerce Clause doctrine.¹²¹ The dormant Commerce Clause doctrine operates to preclude state regulation of interstate or foreign commerce where the subject is national or is one which requires a uniform national rule, or where the state regulation is discriminatory or imposes an undue burden on interstate or foreign commerce. Second, the field of merchant vessel safety and pollution prevention is extensively regulated by international and federal

¹¹⁷362 U.S. 440, 1960 AMC 1549 (1960).

¹¹⁸*Id.* at 442.

¹¹⁹435 U.S. 151, 157, 1978 AMC 527 (1978).

¹²⁰The limits imposed on state regulatory authority by the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment and the Privileges and Immunities Clause contained in Article IV are beyond the scope of this article.

¹²¹The Supreme Court has alternatively referred to this self-executing aspect of the Commerce Clause as the “dormant” or “negative” Commerce Clause. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310 n.9 (1994).

laws and regulations. State authority may therefore be preempted and state laws or regulations may be superseded by those international or federal laws through operation of the Supremacy Clause. Third, even where state law is not displaced by operation of the dormant Commerce Clause or preempted or superseded by operation of the Supremacy Clause, state actions which interfere with the federal government's exclusive power over the foreign relations of the United States may be held to be violative of the Constitution.

State regulation of merchant vessels may be conceptually grouped into one of several categories according to purpose.¹²² A state regulation may be intended simply to provide a duplicate scheme for enforcing federal requirements, without creating any new or different state rule or standard.¹²³ Alternatively, the state regulation may be interstitial; that is, designed to fill an actual or perceived gap in the federal regulatory scheme by interposing state standards applicable to a subject for which no federal rules or standards exist.¹²⁴ Finally, the state regulation may establish a standard that is different from the federal standard. The state regulation may differ in that it is either more or less stringent than the federal standard.¹²⁵ Each of the above described classes of state regulations may raise distinct questions, such as whether the state regulation, as applied, regulates the same subject or has the same purpose as its federal counterpart,¹²⁶ and whether the state regulation is consistent with or conflicts with the federal regulation or policy on that subject.

¹²²Three similar theories are invoked in the context of applying state law in private admiralty cases. See Burrell, *Application of State Law to Maritime Claims: Is There A Better Guide Than Southern Pacific Co. v. Jensen?*, 21 Tul. Mar. L.J. 53, 63 (1996) (state law may be applied to: 1) fill gaps in maritime law; 2) supplement the maritime law; or, 3) where "local" interests predominate).

¹²³See, e.g., *California v. Zook*, 336 U.S. 725 (1949) (examining a state act which made it criminal under state law to violate certain regulations of the Interstate Commerce Commission).

¹²⁴In *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 8, 1937 AMC 1490 (1937), for example, the State of Washington's regulations applied only to motor tugs, which were not subject to inspection by the federal government. Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 445, 1960 AMC 1549 (1960), the City of Detroit's regulation applied only to vessel air emissions, a matter not directly regulated by federal law.

¹²⁵See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 1984 AMC 1027 (9th Cir. 1984), cert. denied, 471 U.S. 1140, 1985 AMC 2395 (1985); Note, *Oil Tanker Regulation: A State or Federal Area?*, 19 Nat. Res. J. 701 (1979). State acts imposing different or more stringent standards likely reflect a contrary risk evaluation by the state or a different judgment on the cost-benefit balance to be struck.

¹²⁶See *Huron*, 362 U.S. at 445-46 (contrasting the "purpose" of the federal regulations with the purpose underlying the state smoke emission regulation and finding "no overlap"), and *Pacific Gas & Elect. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (contrasting federal purpose—to ensure *safety* of nuclear power facilities—with *economic* purpose of state act—to restrict construction of nuclear power facilities until nuclear waste storage and disposal needs could be addressed).

A. Commerce Clause Limits on State Authority

Dormant Commerce Clause analysis entails a normative evaluation, applying judge-made constitutional standards, to determine the appropriate state role under the constitutional framework in matters affecting commerce. This section examines the general outline of the dormant Commerce Clause doctrine and the extent to which the power to regulate commerce is exclusively federal. It then provides a particularized analysis of state regulation of foreign commerce.

1. The Dormant Commerce Clause Doctrine

The dormant Commerce Clause doctrine is a court-imposed limitation on state authority which "has long been understood to provide protection from state legislation inimical to the national commerce even where Congress has not acted."¹²⁷ Analysis of a state act under the dormant Commerce Clause asks whether state power to regulate the particular subject matter is precluded by the constitutional allocation of power over the subject matter to the federal government. The doctrine comprises three distinct inquiries. First, whether state competency is denied because the subject to be regulated is national or requires a uniform national rule. Second, the analysis determines whether the state act, as implemented, is even-handed. If a state act discriminates against interstate or foreign commerce it is invalid unless the state shows that it could not serve the legitimate local purpose by reasonable, non-discriminatory means.¹²⁸ Finally, the inquiry may require a weighing of the putative state benefits to be obtained from the legislation against the burden it may impose on interstate or foreign commerce. Even-handed state laws affecting commerce incidentally may be struck down if they impose an undue burden on interstate or foreign commerce,¹²⁹ or if they purport to control the conduct of non-citizens beyond the state's borders.¹³⁰

Commerce Clause analysis is concerned primarily with the question of constitutional competency, not construction of federal statutes. If the federal government has exercised its commerce powers on a subject, by statute or by

¹²⁷*Barclays Bank*, 512 U.S. at 310 (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)) (internal quotation marks omitted).

¹²⁸See *Oregon Waste Systems, Inc. v. Oregon Dep't of Env. Quality*, 511 U.S. 93 (1994) (holding that state laws which discriminate against interstate commerce are per se invalid), and *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

¹²⁹See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 891 (1988), and *United States v. Lopez*, 514 U.S. 549, 579–80 (1995) (Kennedy & O'Connor, JJ., concurring).

¹³⁰See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).

international agreement, the commerce power is no longer "dormant," and the Court will ordinarily not employ a dormant Commerce Clause analysis.¹³¹ In such cases any constitutional challenge to the state regulations must be grounded in the Supremacy or Foreign Affairs Clauses. Any examination of state legislative competency must also consider that Congress may allow states to legislate on a subject that would, but for the consent of Congress, be unconstitutional under the dormant Commerce Clause.¹³²

Gibbons v. Ogden,¹³³ the Marshall Court's landmark inquiry into federalism in the context of maritime commerce, brought together the advocacy of Daniel Webster and the constitutional vision of Chief Justice John Marshall.¹³⁴ Webster's arguments to the Court recounted the very kind of state mischief which the Founders sought to avoid by allocating the power over commerce to the federal government.¹³⁵ Under New York law at the time, no steam vessel was permitted to navigate on New York waters without a state license, and such licenses were granted exclusively to two named individuals. Connecticut banned from its waters any vessel holding a New York license. New Jersey provided a cause of action with treble damages recoverable for any citizen of the state who was restrained from operating vessels in New York. State discrimination threatened to Balkanize the infant Republic's waterways.

At the outset, Chief Justice Marshall rejected the State of New York's argument that the Commerce Clause powers of the federal government should be narrowly construed.¹³⁶ On the contrary, the Court held, the federal Commerce Clause power, like all other powers vested in Congress, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution. . . ."¹³⁷ The

¹³¹See *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986) ("the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors.").

¹³²See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (once Congress acts, courts are not free to review state regulations under dormant Commerce Clause; when Congress has struck a balance it deems appropriate, courts are no longer needed to prevent states from burdening commerce), and *Northeast Bancorp, Inc. v. Board of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("Here the commerce power of the Congress is not dormant, but has been exercised by that body. . . . When Congress so chooses, statutes which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.") (citations omitted).

¹³³22 U.S. (9 Wheat.) 1 (1824).

¹³⁴B. Cardozo, *The Nature of the Judicial Process* 169-70 (1921) (Chief Justice John Marshall "gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.").

¹³⁵22 U.S. at 4.

¹³⁶See *id.* at 187-88.

¹³⁷*Id.* at 195.

Court next defined the scope of the federal commerce power as including the power to regulate the instrumentalities of commerce, including vessels engaged in interstate commerce.¹³⁸ The federal power, the Court explained, extends to commerce by such vessels even while they are operating within the limits of the states.¹³⁹

Chief Justice Marshall's analysis of the respective arguments by the advocates in the case marks the seminal occasion on which the Court identified the close relationship between the federal admiralty jurisdiction under Article III of the Constitution (tied as it was to locality on the navigable waters¹⁴⁰) and the federal commerce power over waters used for interstate or foreign commerce.¹⁴¹ Not surprisingly, subsequent cases held that the power to regulate navigation necessarily carried with it the power to control the nation's navigable waters.¹⁴² *Gibbons* and its progeny thus provided an early constitutional basis for the Congress to enact laws to promote vessel safety¹⁴³ and to protect the navigable waterways of the nation from obstruction or pollution.¹⁴⁴

Having confirmed the constitutional authority of Congress to regulate vessels engaged in interstate commerce, even while operating within the waters of a particular state, the Court turned to the Supremacy Clause challenge to the New York law which purported to confer an exclusive right to navigate steamboats in New York waters. *Ogden*, the holder of the New York license, sought to enjoin *Gibbons* from operating his ferryboats between Elizabethtown, New Jersey, and New York. *Gibbons* defended, claiming that his vessels' federal license to engage in the coastwise trade gave him a right under federal law to navigate between those ports. The

¹³⁸See *id.* at 190, 197 ("The power over commerce, including navigation, was one of the primary objects for which the people of American adopted their government."), and *id.* at 229 ("When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it, as vital motion is from vital existence.") (Johnson, J., concurring). Although the Court distinguished state "inspection laws," "the purpose of which was to enhance safety and not to restrict competition," it is clear from the context of the opinion and the arguments of counsel that the Court was referring to inspection of "goods" being imported or exported, not of the instrumentalities of commerce. *Id.* at 118-23, 203.

¹³⁹*Id.* at 107. See also *Smith v. Turner*, 48 U.S. (7 How.) 283, 414, 415, 462 (1849).

¹⁴⁰See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

¹⁴¹See *id.* at 21-22 ("It is not unreasonable, to say, that what are called the waters of New York, are, for purposes for navigation and commercial regulation, the waters of the United States . . . their use, for those purposes, seems to be intrusted to the exclusive power of congress."). See also *id.* at 92-96 (contrary arguments by respondents).

¹⁴²See, e.g., *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1866).

¹⁴³See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (upholding the application of federal steamboat inspection laws to vessels plying the navigable waters of the United States within the boundaries of a single state).

¹⁴⁴See, e.g., Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-406; Federal Power Act, 16 U.S.C. §§ 791a-828c; Ports and Waterways Safety Act of 1972, tit. I, 33 U.S.C. §§ 1221-1236.

Court held that the New York law was preempted to the extent that it precluded a licensee from engaging in a trade to which he was entitled under the federal law.

Beyond its preemption holding, the Court's decision in *Gibbons* is an important datum point in the development of federalism jurisprudence owing to Chief Justice Marshall's intimation that the decision could have been grounded instead on Daniel Webster's argument that the federal Commerce Clause power was exclusive.¹⁴⁵ At the time, three theories of Commerce Clause authority competed for acceptance: (1) the theory that the power was exclusively federal; (2) the concurrent power theory, which posited that the state governments enjoyed concurrent power over commerce, just as they do in most taxation matters; and, (3) the compromise theory, eventually adopted by the Court in *Cooley v. Board of Wardens*, which recognized state concurrent power over *local* commerce matters, but entrusted those commerce matters which are *national* or which require a uniform national rule solely to the federal government.¹⁴⁶

In *Gibbons*, Chief Justice Marshall concluded that there "is great force to [Webster's] argument, and the court is not satisfied that it has been refuted."¹⁴⁷ Declining, however, to reach the constitutional question when the case could be decided on statutory preemption grounds, the Court deferred the Commerce Clause inquiry for another day.¹⁴⁸ That *Gibbons* left unresolved the respective limits of state and federal power over commerce is demonstrated by the fact that the Court heard more than 100 cases involving construction of the Commerce Clause in the next sixty years.¹⁴⁹

In *Cooley v. Board of Wardens*, the Court first answered the question whether the federal Commerce Clause power is exclusive or concurrent. The case concerned a constitutional challenge to a Pennsylvania statute requiring

¹⁴⁵22 U.S. at 13, 209, 221. In summarizing Webster's arguments, the Court pointed out, "He did not mean to say, that *all* regulations which might, in their operation, affect commerce, were exclusively in the power of congress; but that such power as had been exercised in this case, did not remain with the states." *Id.* at 9 (emphasis in original). Compare the arguments of Oakley for the Respondent, *id.* at 63 (the commerce power is concurrent).

¹⁴⁶See J. Kallenbach, *Federal Cooperation with the States Under the Commerce Clause* 24-45 (1968).

¹⁴⁷22 U.S. at 209.

¹⁴⁸*Id.* at 210 (should the New York law "come into collision with an act of congress . . . it will be immaterial, whether those laws were passed in virtue of a concurrent power to regulate commerce") (internal quotation marks omitted). Justice Story, relying on *Gibbons* and *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 445, 446 (1827), later concluded that the federal commerce power was exclusive. Story, *supra* note 48, at §§ 1063 & 1067. He also reported in his dissenting opinion in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (Story, J., dissenting), that while on the Court, Chief Justice Marshall was prepared to declare the federal commerce power exclusive.

¹⁴⁹B. Gavitt, *The Commerce Clause of the United States Constitution* app. A (1932) (summarizing cases).

vessels engaged in foreign or interstate commerce to engage a local navigation pilot to guide the vessel into and out of the state's ports.¹⁵⁰ The majority found no conflict with any federal statute, obviating the Supremacy Clause analysis employed in *Gibbons*. The majority's analysis then turned to the question whether state authority to regulate vessels engaged in interstate or foreign commerce was displaced by the Commerce Clause.¹⁵¹ If the federal Commerce Clause power was exclusive, the states were without power to legislate on matters touching upon commerce even in the absence of federal legislation. If, on the other hand, the commerce power was, like the taxation power, concurrent then state laws were valid unless preempted by federal legislation.¹⁵²

Justice Curtis, writing for the six member majority,¹⁵³ adopted what has become known as the "selectively exclusive" approach to federal Commerce Clause analysis. He first framed the analysis as turning on the question whether the subject matter regulated by the state legislation was "in [its] nature national, or admit(s) of only one uniform system or plan of regulation."¹⁵⁴ If the subject was national *or* admits of only one uniform system or plan of regulation, the subject is one for "exclusive legislation by Congress."¹⁵⁵ Applying the rule to the Pennsylvania pilotage statute, the majority determined that the subject was essentially local, and therefore appropriate for state legislation.¹⁵⁶ The Court's decision was apparently influenced in large part by the fact that the first Congress had, in 1789, enacted legislation which "manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive [federal] legislation."¹⁵⁷ At the same time, however, the Court recognized that the state statute might later be preempted by federal

¹⁵⁰The Act applied to vessels arriving from, or bound to, foreign ports or places, and to vessels of 75 or more tons sailing from or to ports outside the Delaware River. 53 U.S. at 311. Vessels covered by the Act were required either to take a pilot or pay one-half of the pilotage fee to a fund for the relief of disabled pilots or their widows and children.

¹⁵¹Id. at 318 ("we are brought directly and unavoidably to the consideration of the question, whether the grant of commercial power to Congress, did per se deprive the states of all power to regulate pilots.").

¹⁵²Id. at 318-19.

¹⁵³Justice Daniel, best known for his dissents from earlier cases which expanded the federal admiralty and maritime jurisdiction, concurred in the judgment but not in the majority's reasoning. Justice Daniel opined that Congress' commerce powers did not extend to pilotage regulations. Id. at 326. Justices McClean and Wayne dissented, reasoning that the Court's prior decisions provided no authority for the states to legislate on matters of interstate or foreign commerce. Id. at 322-23.

¹⁵⁴Id. at 319.

¹⁵⁵Id. See also *California v. Zook*, 336 U.S. 725, 728 (1949) ("the familiar test is that of uniformity versus locality. If a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominately local interest, state action is sustained.").

¹⁵⁶*Cooley*, 53 U.S. at 319.

¹⁵⁷Id. at 320 (quoting Act of Aug. 7, 1789, 1 Stat. 54) ("How then can we say, that by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject,

legislation if Congress chose to enact federal pilotage statutes applicable to the same vessels. Thus, although Congress could constitutionally supersede such local regulations through the exercise of its Commerce Clause (or Admiralty Clause¹⁵⁸) powers, and such federal laws would then displace any conflicting state law by operation of the Supremacy Clause,¹⁵⁹ until Congress acts such "maritime but local" regulations are within the power of the state legislatures.¹⁶⁰ By contrast, if the subject had been deemed national or to admit of only one uniform system or plan of regulation, the state law would be displaced, and (under *Cooley*) even Congress could not empower the states to regulate the subject.¹⁶¹

Thus, Congress has the express power to regulate interstate and foreign commerce and may if it chooses completely preempt the states from any subject falling within that power. Even in the absence of preemptive federal legislation the states may not constitutionally legislate on subjects where the subject is national or admits of only one uniform system or plan of regulation.¹⁶² By contrast, states may legislate on peculiarly local subjects, unless superseded by federal law. Unfortunately, the Supreme Court in *Cooley* provided no test for determining whether a subject matter is

because from the nature of the power the legislation of Congress must be exclusive?"). The saving clause for state pilotage regulation is presently codified at 46 U.S.C. § 8501(a).

¹⁵⁸The Supreme Court has applied a similar "maritime and local" standard in private litigation arising under the Admiralty Clause, to permit application of state remedies law in situations where, because of the "local" nature of the claim, application of state law would not disrupt the harmony and uniformity of the general maritime law. See, e.g., *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). In his concurring opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321-24, 1955 AMC 467 (1955) (Frankfurter, J., concurring), Justice Frankfurter relied on a comparable "maritime but local" standard.

¹⁵⁹State regulation of pilotage for coastwise vessels (vessels transiting between two United States ports) was, in fact, later superseded. See 46 U.S.C. § 8502 and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 159-60, 1978 AMC 527 (1978) (citing *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912)).

¹⁶⁰The Court's allegiance to the *Cooley* test was reaffirmed in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625 (1973). See also *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1991 AMC 2797 (9th Cir. 1990), cert. denied, 504 U.S. 979 (1992) (applying the *Jensen* "uniformity" test to a case involving a challenge to a state regulation of crew wages). For a criticism of the result reached in *Aubry*, see Scowcroft, Note, 23 J. Mar. L. & Com. 635 (1992).

¹⁶¹*Cooley*, 53 U.S. at 317 ("If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this [federal pilotage] act could not confer upon them the power thus to legislate."). This rule barring even Congress from empowering states to legislate on matters which are in their nature national or require a uniform national rule is virtually identical to the rule for private admiralty law established in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). See *Bederman*, Uniformity, Delegation and the Dormant Admiralty Clause, 28 J. Mar. L. & Com. 1, 19 (1997).

¹⁶²The *Cooley* Commerce Clause test is quite similar to the *Jensen* test formulated to address similar state law displacement question arising under the substantive admiralty law. See generally M. Ball, *Law of the Sea: Federal-State Relations* 61 & n.257 (1978) (concluding that the "uniformity/diversity measure may be said to serve as a standard common to analysis" under the admiralty, commerce, and supremacy clauses).

essentially national or admits of only one uniform system of regulation, or is maritime but local, and therefore amenable to state regulation. Later cases have upheld state regulation of vessels under the maritime but local exception when the state sought to establish regulations for anchoring or mooring vessels,¹⁶³ or to designate wharves or piers which may be used to receive or load cargo or passengers.¹⁶⁴ A second weakness in the *Cooley* maritime but local formulation is its failure to provide a clear subject focus for the inquiry. The opinion adverts to the legislative "subject," but never identifies what the exact subject of its inquiry was, or how broadly or narrowly the subject is to be defined.¹⁶⁵ Later courts were therefore left to determine whether the *Cooley* maritime but local inquiry turns on the nature of the activity regulated (commercial vessel pilotage in coastal waters) or on the consequences which the state regulation seeks to avoid (safety of life and property on state waterways). The distinction is an important one¹⁶⁶ and, as will be seen, one for which the answer has not been consistent.

Three later cases by the Supreme Court examining direct state regulation of commercial vessel safety and vessel-source pollution provide guidance in this maritime federalism inquiry. In *Kelly v. Washington ex rel. Foss Co.*, a 1937 challenge to a Washington state motor tug safety and inspection statute by a company whose tugs were engaged in interstate and foreign commerce, the Washington Supreme Court had earlier invalidated the statute after concluding that the federal government had occupied the field of safety and inspection of vessels on navigable waters of the United States.¹⁶⁷ The state appealed to the United States Supreme Court. Chief Justice Hughes began his analysis for the unanimous Court by acknowledging the federal government's authority under the Commerce Clause to regulate the tugs covered by the Washington statute.¹⁶⁸ The Court found, however, that the federal

¹⁶³See *Norfolk S. Corp. v. Oberly*, 594 F. Supp. 514 (D. Del. 1984) & 632 F. Supp. 1225 (D. Del. 1986), *aff'd*, 822 F.2d 388, 1987 AMC 2896 (3d Cir. 1987) (upholding local restrictions on anchoring in Delaware Bay).

¹⁶⁴See *Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 1936 AMC 1 (1935), and *Workman v. City of New York*, 179 U.S. 552 (1900).

¹⁶⁵In its approach to constitutional jurisdiction under the Admiralty Clause, the Court has generally favored a very broad subject matter inquiry. See *Sisson v. Ruby*, in which the Court held that the subject matter inquiry for admiralty tort jurisdiction requires an assessment of the "general features of the type of incident involved." 497 U.S. 358, 363, 1990 AMC 1801 (1990) (emphasis added).

¹⁶⁶For example, the "subject" of vessel "standards as to structure, design, equipment, and operation" requires a uniform national rule. *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 15, 1937 AMC 1490 (1937). However, state regulation of vessel-source pollution does not. See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 1960 AMC 1549 (1960).

¹⁶⁷*State ex rel. Foss Co. v. Kelly*, 59 P.2d 373, 376 (Wash. 1936), *rev'd*, 302 U.S. 1, 1937 AMC 1490 (1937).

¹⁶⁸302 U.S. at 4 (holding that "[i]t cannot be doubted that the power of Congress over interstate and foreign commerce embraces the authority to make regulations for" safety and inspection of tugs.).

government had so far exercised its authority only with respect to limited classes of towing vessels (those propelled by steam or those carrying passengers or cargo), while leaving motor tugs unregulated.¹⁶⁹ When the Court turned to the dormant Commerce Clause analysis, it first restated the rule established in *Cooley*, noting that the question whether the federal government had occupied the field was "unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action."¹⁷⁰ "In that class of cases," the Court held, "the Constitution itself occupies the field even if there is no federal legislation."¹⁷¹ The Court expressed its concern over the potential problems which might arise if states were permitted to regulate vessel *design, equipment, and operation*,¹⁷² but nevertheless concluded that there was a limited field within which states were constitutionally competent to act. "If, however, the state goes further and attempts to impose particular standards as to structure, design, equipment and operation . . . which pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule."¹⁷³ The Court declined to provide any guidance on how it would determine whether a state law was "essential" to safety or seaworthiness. It is clear from the Court's discussion in *Kelly*, however, that its decision was heavily influenced by the fact that the only vessels that would be subject to the Washington statutes fell outside of the federal regulatory scheme in place at that time.¹⁷⁴

In 1960, Justice Stewart, writing for the majority of the Court in *Huron Portland Cement Co. v. City of Detroit*,¹⁷⁵ examined the constitutionality of Detroit's enforcement of a smoke abatement ordinance on merchant vessels engaged in interstate commerce on the Great Lakes. The Court's precedents

¹⁶⁹Id. at 8.

¹⁷⁰Id. at 9.

¹⁷¹Id.

¹⁷²Id. at 15 (emphasis added). The Court also warned that, if permitted, the "state of Washington might prescribe standards, designs, equipment, and rules of one sort, Oregon another, California another, and so on." Id.

¹⁷³Id.

¹⁷⁴The same concerns were expressed by the Court in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 1996 AMC 2372 (1875), in which it upheld a state maritime lien law. The Court first observed that "[I]t would undoubtedly be far more satisfactory to have a uniform maritime law regulating . . . liens," but because Congress had so far failed to enact such a system, the states were free to do so "until Congress interposes, and thereby excludes further State legislation." Id. at 581. Congress later enacted a "Commercial Instruments and Maritime Liens" chapter, which expressly supersedes most state law maritime liens. See 46 U.S.C. § 31307.

¹⁷⁵362 U.S. 440, 1960 AMC 1549 (1960). See generally Note, State Environmental Protection and the Commerce Clause, 87 Harv. L. Rev. 1762, 1769-72 (1974).

established a two-part test for the validity of local laws designed to evenhandedly promote the health and welfare of local inhabitants. Such laws, Justice Stewart explained, will be upheld unless preempted by federal law or unduly burdensome on maritime activities or interstate commerce.¹⁷⁶ The majority dismissed the Commerce Clause challenge in two paragraphs which focused on whether the Detroit ordinance was discriminatory.¹⁷⁷ Interestingly, even though the *subject* regulated in both *Kelly* and *Huron*—commercial vessels engaged in interstate or foreign commerce—was the same, in *Huron* the Court focused on the *purpose* of the respective federal and state regulations rather than on their *subject*.¹⁷⁸ The Court's opinion provides no insight into how it determined whether the subject involved was one which was in its nature national or which required a uniform rule. Justices Douglas and Frankfurter dissented on preemption grounds after distinguishing the Detroit ordinance from the Washington statute at issue in *Kelly v. Washington ex rel. Foss Co. Kelly*, Justice Douglas explained, involved a state law affecting a matter "which the federal laws and regulations left untouched" (the *subject* test followed by the Court in *Kelly*).¹⁷⁹ By contrast, the federal law at issue in *Huron* provided a comprehensive regulatory scheme for vessel boilers and their fuels.¹⁸⁰ The Detroit ordinance in effect denied the challengers the opportunity to operate their vessels in Detroit notwithstanding their compliance with federal law.¹⁸¹ The dissenters criticized the majority's decision as inviting a "variety of requirements for equipment" which the states would now be permitted to force on vessel owners in order to meet state and local air pollution control measures.¹⁸²

The third of the vessel safety and pollution prevention cases is the Court's 1978 decision in *Ray v. Atlantic Richfield Co.*¹⁸³ *Ray* involved a challenge

¹⁷⁶*Huron*, 362 U.S. at 443.

¹⁷⁷*Id.* at 448.

¹⁷⁸*Id.* at 445.

¹⁷⁹*Id.* at 449 (internal quotation marks omitted) (Douglas & Frankfurter, JJ., dissenting).

¹⁸⁰*Id.* Justice Douglas apparently found a similar distinction between the federal Water Quality Improvement Act of 1970 and the Florida statute at issue in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973). The WQIA was restricted to a spiller's liability to the federal government for removal costs. The Florida law was addressed to liability for state government removal costs and damage to public and private property in the state. Because the acts were addressed to different subjects, the Court concluded, there was no possibility of conflict. *Cf. id.* at 341–44. The three judge panel which heard the original challenge found that a conflict was "inevitable" between the Florida requirement for vessels to carry containment equipment and federal law, as established by the federal Steamboat Inspection Act and the International Convention on the Safety of Life at Sea. See *American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241, 1246, 1972 AMC 91 (M.D. Fla. 1971), *rev'd*, 411 U.S. 325, 1973 AMC 811 (1973).

¹⁸¹*Huron*, 362 U.S. at 451–52 (Douglas & Frankfurter, JJ., dissenting).

¹⁸²*Id.* at 455.

¹⁸³435 U.S. 151, 1978 AMC 527 (1978).

by two oil transport companies, joined by the United States as *amicus curiae*, to the Washington State Tanker Law. The Tanker Law imposed pilotage requirements, vessel size limits, and equipment and operating requirements on tankers navigating in Washington waters. Five years earlier, in *Askew v. American Waterways Operators, Inc.*,¹⁸⁴ the Court had briefly examined the question regarding displacement of state law in the area of remedies for vessel-source pollution under private law. *Ray* presented the distinct but related question regarding possible displacement of state safety laws directed at tankers operating in state waters. Having invalidated in earlier sections of the decision the state's construction, design, and equipment requirements on preemption grounds, Justice White's opinion for the Court¹⁸⁵ turned to the question whether the state's escort tug requirement, though not preempted, might nevertheless be an invalid encroachment upon the federal commerce power. Justice White likened the Washington escort tug requirement to the local pilotage requirement at issue in *Cooley*; an operating rule "arising from the peculiarities of local waters that call for special precautionary measures."¹⁸⁶ Finding that a requirement that a vessel take on a tug escort when entering a particular body of water is not the type of regulation that demands a uniform national rule, Justice White concluded that the Washington requirement did not violate the Commerce Clause.¹⁸⁷

2. State Authority in Matters Affecting Foreign Commerce

Foreign commerce and the instrumentalities used to facilitate that commerce are a matter of heightened national concern. In this "unique" context, the Supreme Court has ruled, the states' power is constrained by a "special need for federal uniformity."¹⁸⁸ State regulation of foreign commerce raises

¹⁸⁴411 U.S. 325, 1973 AMC 811 (1973). *Askew* addressed the narrow remedial law question of whether a state law providing for recovery of marine pollution removal costs and damages, thereby "overlapping" with the maritime law, was displaced by *Jensen* and *Knickerbocker* or by the federal Water Quality Improvement Act.

¹⁸⁵Six justices (Burger, Stewart, Blackmun, Marshall, Brennan, and Rehnquist) joined Justice White in Part VII of the decision, which addressed the escort tug requirement. See 435 U.S. at 181. Justices Stevens and Powell dissented from Part VII. See *id.* at 190. The voting pattern in the case is analyzed in H. Baer, *Admiralty Law of the Supreme Court* § 27-4, at 708-23 (3d ed. 1979).

¹⁸⁶435 U.S. at 171.

¹⁸⁷*Id.* at 171-72 & 179. Earlier in the opinion the Court addressed the circumstances in which the Washington escort tug requirement might be preempted. *Id.* at 171-72 ("It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause.") (dictum). Readers familiar with the legislative history of the Oil Pollution Act of 1990 will recognize the importance of the Court's decision in *Ray*, the one case Congress singled out to expressly preserve against legislative overruling. See H.R. Conf. Rep. No. 101-653, at 122 (1990), reprinted in 1990 U.S.C.C.A.N. 800. The effect of OPA 90 on maritime preemption will be analyzed in Part II of this article.

¹⁸⁸*Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986).

the additional concern that the nation must "speak with one voice when regulating commercial relationships with foreign governments."¹⁸⁹ The Court has acknowledged that foreign policy is "much more the province of the Executive Branch and Congress than of this Court."¹⁹⁰ Accordingly, the opinion of the Executive Branch regarding the potential impact of state action on the nation's foreign affairs or commerce is crucial,¹⁹¹ but not dispositive,¹⁹² in the Court's assessment of state laws which implicate the Foreign Commerce Clause.¹⁹³

In reviewing the constitutionality of state regulations the Supreme Court's Foreign Commerce Clause analysis often closely resembles the Supremacy Clause analysis (discussed below).¹⁹⁴ State legislation which affects foreign commerce and foreign relations is subject to stricter scrutiny than are state laws affecting only interstate commerce.¹⁹⁵ The Court's solicitude for foreign commerce is grounded in part on the policy of uniformity embodied in the Commerce Clause.¹⁹⁶ The Court has also recognized that "in international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."¹⁹⁷ The Supreme Court sounded this theme in *Ray v. Atlantic Richfield Co.*, when it highlighted the need for the nation to speak with one voice in matters of vessel design and construction.¹⁹⁸

¹⁸⁹*Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 1979 AMC 881 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

¹⁹⁰*Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983).

¹⁹¹See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 73, 1993 AMC 2318 (1993) (distinguishing the Court's decision in *Japan Line* with that in *Container Corp.* in part on the basis of the fact that the Executive Branch had decided not to file an amicus curiae brief in *Container Corp.*).

¹⁹²*Id.* at 75 (quoting *Container Corp.*, 463 U.S. at 195-96). Justice Scalia rejects the principle, to the extent that it accredits the Executive's opinion, on the ground that the decision on "which state regulatory interests should currently be subordinated to our national interest in foreign commerce" is solely one for the Congress. *Id.* at 81 (Scalia, J., concurring). On this point, Justice Blackmun agreed. *Id.* at 85 (Blackmun, J., dissenting) ("it is well established that Congress may authorize state regulation of foreign commerce which would otherwise be impermissible, but the President may not authorize such regulation by filing an amicus curiae brief.") (internal quotation marks and citations omitted).

¹⁹³See *Wardair*, 477 U.S. at 12 ("It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to reverse the policy that the Federal Government has elected to follow.").

¹⁹⁴See Schmahmann & Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties With Burma (Myanmar)*, 30 Vand. J. Transnat'l L. 175, 183 n.28, 199 (1997) (citing the Court's "one national voice" analysis in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 1979 AMC 881 (1979)). See also Schmahmann et al., *Off the Precipice: Massachusetts Expands Its Foreign Policy Expedition from Burma to Indonesia*, 30 Vand. J. Transnat'l L. 1021 (1997).

¹⁹⁵See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984); *Wardair*, 477 U.S. at 7-8; *Container Corp.*, 463 U.S. at 194 (distinguishing between the "one voice" constraint imposed by the Foreign Affairs Clause and Article VI preemption analysis).

¹⁹⁶*Wardair*, 477 U.S. at 8.

¹⁹⁷*Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) (quoted in *Japan Line*, 441 U.S. at 448).

¹⁹⁸435 U.S. 151, 168, 1978 AMC 527 (1978). The Court held that it is not within the power of a state

B. Supremacy Clause Limits on State Authority

Commerce Clause analysis of state laws regulating merchant vessel safety begins with the recognition that the power to regulate some aspects of commerce is shared between federal and state governments.¹⁹⁹ Where, however, the dormant Commerce Clause doctrine applies it operates to oust the states of legislative competence, without regard to whether Congress has enacted federal legislation on the same subject. Even where the state law does not run afoul of the dormant Commerce Clause, state authority may nevertheless be preempted and state laws may be superseded by operation of the Supremacy Clause. The dormant Commerce Clause doctrine may thus be viewed as a rule of constitutional preemption, while the Supremacy Clause is seen as a rule of preemption by other federal law sources.

1. Effect of Preemption and Supersession Doctrines

Article VI of the Constitution provides the textual basis for the modern federal preemption doctrine.²⁰⁰ Briefly stated, the doctrine provides that so long as the federal government acts within a subject area delegated to it by the Constitution, any state or local government law that conflicts with the "law of the land" so created is preempted by operation of the Supremacy Clause. Equally important to its role in establishing the supremacy of federal law is the power of judicial review Article VI implicitly confers upon the federal courts.²⁰¹ The Supremacy Clause acts not only to *supersede* state

to impose different or stricter standards than Congress has enacted with the hope of having them internationally adopted or accepted as a result of the international accord. *Id.*

¹⁹⁹Analogously, in the private maritime law area, the Court's analysis in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1978 AMC 811 (1973), identifies the three inquiries which are relevant in evaluating state regulations affecting maritime commerce: (1) whether the state law conflicts with federal law; (2) whether the state law is preempted by federal law; and, (3) "whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government."

²⁰⁰Article VI provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

U.S. Const. art. VI, cl. 2.

²⁰¹See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (affirming the Court's power of judicial review of federal legislation); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (exercising judicial review of a state statute); *The Federalist* No. 39 (James Madison) ("in controversies relating to the boundary between the two jurisdictions" of national and state governments, "the tribunal which is ultimately to decide, is to be established under the general government."); *The Federalist* No. 78 (Alexander Hamilton).

laws which conflict with federal law, it also acts to *preempt* or preclude state authority to enact laws or regulations that, while not inconsistent with federal law, purport to regulate a subject which the federal government has intended to entrust solely to federal control. The law of the land which is "supreme" under Article VI includes not only the statutes enacted by Congress, but also proclamations by the President,²⁰² regulations promulgated by federal administrative agencies under authority of federal law,²⁰³ and international law, including both its customary and conventional components.

2. Traditional Preemption Analysis

In its approach to federal preemption questions the Supreme Court has fashioned a two-tier analysis. First, if Congress (or another source of federal law) has either explicitly or implicitly evidenced an intent to exclusively occupy a given field, state authority to regulate that same field is *preempted*.²⁰⁴ Second, even when Congress has not entirely displaced state regulation over the subject matter, state law is *superseded* if it conflicts with federal law. A conflict will be found if the court determines that it is impossible to comply with both the federal law and its state counterpart,²⁰⁵ or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.²⁰⁶

In conducting preemption analyses the courts have recognized that the particular subject matter being regulated is a critical factor in the court's analysis.²⁰⁷ As discussed earlier, if the subject matter is in its nature national or one which requires a uniform rule, state authority will be displaced by the

²⁰²See *Neighbors*, Presidential Legislation By Executive Orders, 37 U. Colo. L. Rev. 105 (1964).

²⁰³See *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citations omitted), and *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). The regulations must be based on a valid delegation of authority. See *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988).

²⁰⁴See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978). Professor Tribe refers to federal occupation of a field as a "jurisdictional veto" of state authority. See L. Tribe, *American Constitutional Law* § 6-27, at 497 (2d ed. 1988).

²⁰⁵See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). It is doubtful whether the particular application of the preemption test to the facts in *Florida Lime* would command the allegiance of the modern Court. See *Ray*, 435 U.S. at 168 n.19 (distinguishing *Florida Lime* in part because the "federal regulations claimed to pre-empt state law [in that case] were drafted and administered by local organizations.").

²⁰⁶See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), and *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the federal Alien Registration Act preempts state regulation of aliens). The test is sometimes alternatively posed as whether there is an "irreconcilable conflict between the Federal and State rules and standards." *Silkwood*, 464 U.S. at 256.

²⁰⁷See, e.g., *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 1984 AMC 1027 (9th Cir. 1984), cert. denied, 471 U.S. 1140, 1985 AMC 2395 (1985).

dormant Commerce Clause doctrine. The Court has also recognized that a few areas involving “uniquely federal interests” are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law.²⁰⁸ Federal court decisions demonstrate a tendency to more readily displace state law in cases involving commercial merchant shipping—particularly international shipping—than in more localized maritime matters.²⁰⁹ And states may be preempted from prescribing regulations governing the safety aspects of an industry even though they are free to impose civil liability for conduct which complies with the preemptive federal safety standards.²¹⁰ Finally, when Congress has created a federal agency to regulate a particular subject matter or industry, the Court is more likely to find state authority displaced.

a. Express Preemption

Analysis of the states’ role in regulating the safety of vessels plying the high seas or navigable waters begins with the recognition that Congress may constitutionally preempt the states from all regulation of commerce, including shipping.²¹¹ An intent to preempt may be made expressly or by implication.²¹² Government statutes or regulations may expressly preempt state authority over a given subject area by including a plain statement that the federal act is intended to occupy the field.²¹³ In such cases, the states are

²⁰⁸See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

²⁰⁹Cf. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202, 1996 AMC 305 (1996) (limiting the Court’s holding on the availability of state law remedies to “non-seafarers”); *Sisson v. Ruby*, 497 U.S. 358, 367, 1990 AMC 1801 (1990) (the fundamental interest giving rise to maritime jurisdiction is “the protection of maritime commerce”) (citations omitted); *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 321–24, 1955 AMC 467 (1955) (Frankfurter, J., concurring) (questioning whether the majority’s choice of law rule for marine insurance would apply to oceangoing vessels engaged in international trade); *Jones v. Sea Tow Servs. Freeport NY Inc.*, 30 F.3d 360, 1994 AMC 2661 (2d Cir. 1994) (refusing to enforce a Lloyd’s Open Form salvage contract against the owner of a pleasure yacht); *Pacific Merchant Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1416, 1991 AMC 2797 (9th Cir. 1990), cert. denied, 504 U.S. 979 (1992) (distinguishing in its preemption analysis between vessels which depart from and return to the same state and those engaged in foreign, intercoastal, or coastwise trade).

²¹⁰For example, in *Pacific Gas & Electric* the Court held that federal law occupied the field of nuclear power plant safety, yet in *Silkwood* a narrowly divided Court upheld an award of punitive damages under state law for damages resulting from the escape of nuclear material from a federally licensed facility.

²¹¹See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229–30 (1947). In *Gibbons*, the Supreme Court affirmed the preemptive effect of federal legislation under Article VI. Writing for the Court, Chief Justice Marshall explained that by operation of the Supremacy Clause, acts of the state legislatures must yield if they “interfere with, or are contrary to the law of Congress, made in pursuance of the constitution.” 22 U.S. at 209.

²¹²See *The Roanoke*, 189 U.S. 185, 198 (1903).

²¹³See, e.g., 46 U.S.C. § 4306 (providing that, unless permitted by the Secretary, states “may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard, or imposing a requirement for associated equipment.”).

precluded from legislating on the subject without regard to whether the state legislation is consistent with the federal act.²¹⁴ Although preemption statements are not infrequently included in federal legislation, they are seldom unambiguous in their scope.²¹⁵ In areas traditionally regulated by the states through the exercise of their police powers, the courts apply a presumption in favor of a narrow interpretation of express preemption clauses.²¹⁶ The Supreme Court at one time suggested that when Congress includes a preemption provision in a statute matters beyond the reach of that provision are, by implication, not preempted.²¹⁷ Later, however, the Court left open the possibility that implied preemption might be found notwithstanding the fact that the subject the state seeks to regulate falls outside of an express preemption clause.²¹⁸ Lower courts have concluded that an express preemption clause does not preclude a finding of implied preemption.²¹⁹

It could reasonably be concluded that all international agreements to which the United States is party preempt state authority on the same subject as a matter of law.²²⁰ Treaties and other international agreements must bind the entire nation or they are not binding at all. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party throughout its territory.²²¹ A party may not excuse a violation of its treaty obligation by asserting a provision of its internal laws.²²² It may

²¹⁴See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and *Rice*, 331 U.S. at 236.

²¹⁵See *Tribe*, supra note 204, § 6–27, at 500–01.

²¹⁶See *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996) (quoting *Rice*, 331 U.S. at 230), and *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1997 AMC 1921 (11th Cir.) (applying the canon of construction in a preemption challenge relating to motorboat propeller guards), cert. granted, 118 S. Ct. 439 (1997). On the importance of such a canon of construction, see 2B N. Singer, *Sutherland's Statutes and Statutory Construction* § 58.02 (5th ed. 1992).

²¹⁷See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted). But see *Abdullah v. American Airlines, Inc.*, 969 F. Supp. 337, 347–49 (D.V.I. 1997) (disputing the legitimacy of applying the statutory construction maxim of “*expressio unius est exclusio alterius*” in such cases), and 2A Singer, supra note 216, at § 47.25 (“It must be remembered that in the usual circumstances the application of the maxim is subordinated to the basic rule of statutory construction that the intent of the statute prevails.”).

²¹⁸See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–89 (1995) (the existence of an express preemption clause “does not . . . entirely foreclose [] any possibility of implied preemption”).

²¹⁹See *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1992), and *American Auto. Mfrs. Ass'n v. Cahill*, 973 F. Supp. 288, 309 (N.D.N.Y. 1997).

²²⁰See generally Restatement, supra note 19, at § 115 cmt. e (observing that the matter has not been adjudicated).

²²¹See Vienna Convention on the Law of Treaties, entered into force 1980, art. 29, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331, reprinted in 63 Am. J. Int'l L. 890 (1969) & 6F Benedict on Admiralty, Doc. No. 21–1 (7th rev. ed. 1997). Although the United States is not a party to the convention, the Supreme Court has relied upon it in construing the meaning of treaties. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982). This is consistent with the treatment accorded to the convention by the Restatement. See Restatement, supra note 19, at § 102(3) cmt. f & introductory note to pt. III.

²²²Vienna Convention on the Law of Treaties, supra note 221, at art. 27.

therefore be concluded that state legislation bearing on the same subject as an international agreement to which the United States is party should be presumed to be preempted unless the President has entered appropriate exceptions or reservations to the treaty or the implementing United States law includes a provision affirmatively saving state legislative competency on that subject.

b. Implied Preemption

Until 1949, there was respectable authority for the proposition that whenever the federal government regulated a particular subject any state law regulating that same subject was invalid.²²³ Federal legislation on a subject was presumed to occupy the field whether Congress had manifested its intent to do so or not. In that circumstance any state laws establishing requirements consistent with or more stringent than federal standards were invalid. The argument for automatic displacement of state law was laid to rest in 1949, however, by a narrowly divided Court in *California v. Zook*.²²⁴ Thereafter, challenges to state regulations on the basis of implied preemption required a showing that Congress intended to preempt state laws.²²⁵

Implied preemption analysis may involve one or more canons of construction or presumptions.²²⁶ For example, the Court has expressed a reluctance to find preemption in areas traditionally occupied by the states.²²⁷ As a result, when a state's exercise of its police powers in a field in which the states have traditionally occupied²²⁸ is challenged under the Supremacy Clause, the Court has adopted an "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was

²²³See, e.g., *Charleston & W. Cent. Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915), and *Missouri Pac. R. Co. v. Porter*, 273 U.S. 341, 345 (1927). The Supreme Court left the question open in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 320 (1852) (declining to decide the "general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states, upon the same subject.").

²²⁴336 U.S. 725, 729–31 (1949). Justices Douglas, Frankfurter, Jackson, and Burton dissented at length.

²²⁵See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983).

²²⁶The Court has characterized the presumption as being "grounded in experience. . . ." *Zook*, 336 U.S. at 728–29. See also Frankfurter, *supra* note 112, at 569 (canons of construction "give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements."). Justice Scalia has criticized presumptions as canons of construction because they are artificial and likely to increase the unpredictability and occasional arbitrariness of judicial decisions. A. Scalia, *A Matter of Interpretation* 28 (1997).

²²⁷See *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996) (quoting *Rice*).

²²⁸See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted). See also *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Medtronic*, 116 S. Ct. at 2250 (citations omitted).

the clear and manifest purpose of Congress.”²²⁹ The presumption “provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.”²³⁰ The presumption favors state legislation “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”²³¹ Mere silence by Congress cannot suffice to establish a clear and manifest purpose to preempt state authority.²³² However, Congressional intent may be inferred from the structure and purpose of the federal law.²³³

In determining whether Congress intended to occupy fully a particular field the fact that Congress gave an administrative agency discretion to regulate the activity is important.²³⁴ Agency statements on the question of implicit intent to preempt state regulation are dispositive unless either the agency’s position is inconsistent with clearly expressed congressional intent or subsequent developments reveal a change in that position.²³⁵ Similarly, the Court has recognized that the regulating agency may be “uniquely qualified” to determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.²³⁶ The agency’s regulations should prevail in such circumstances unless it is clear that Congress would not have sanctioned preemption of the state laws.²³⁷ An intent to preempt state authority has been inferred where federal law provided that the activity which is the subject of the state law can occur “only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal

²²⁹*Rice*, 331 U.S. at 230 (citations omitted). See also *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Chief Justice Stone appears to have been the first member of the Court to argue in favor of such a presumption. See *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 177 (1942) (Stone, C.J., dissenting). But cf. *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) (holding that congressional intent to supersede a state *safety* statute must be clearly manifested). The presumption has been applied in both express and implied preemption analyses. See *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997).

²³⁰*Rath Packing*, 430 U.S. at 525 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)) (internal quotation marks omitted).

²³¹*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

²³²See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) (citing *Rice*, 331 U.S. at 230).

²³³See *Rath Packing*, 430 U.S. at 525 (citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973), and *Rice*, 331 U.S. at 230).

²³⁴See *Tribe*, *supra* note 204, § 6–28, at 503 (the very existence of a specialized federal regulatory agency may signify a congressional determination that some jurisdictionally-definable aspect of the regulated subject matter demands uniform national supervision). See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177, 1978 AMC 527 (1978) (concluding that Congress intended that judgments regarding tanker safety would be made by a single national decision-maker).

²³⁵See *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

²³⁶*Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2255 (1996).

²³⁷See *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982).

commands.”²³⁸ Even if an agency has comprehensively dealt with a problem the court will not readily infer federal occupation of the field unless the agency makes clear its intent that the regulations are to be exclusive.²³⁹ If the agency does not speak to the question of preemption the court will “pause before saying that the mere volume and complexity of its regulations indicates that the agency did in fact intend to preempt.”²⁴⁰

In its recent preemption cases the Court generally begins by examining both the text of the federal law and any relevant legislative history (or, it would follow, executive intent in the case of international agreements), to determine whether the federal government implicitly intended to exclusively occupy the field.²⁴¹ The entire scheme of the relevant federal law must be considered, and that which must be implied is of no less force than that which was expressed.²⁴² Implicit intent may be evidenced by a pervasive scheme of federal regulation that leaves no room for state and local supplementation.²⁴³ Intent to displace state law may also be inferred if the state law touches a field (e.g., foreign affairs) in which “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁴⁴ Finally, an intent to assign the subject exclusively to the federal government may be inferred when the goals sought to be obtained or the obligations imposed by the federal law reveal a purpose to preclude state authority.²⁴⁵

Like the problems of characterization or classification which are so often

²³⁸See *Lockheed Air Terminal*, 411 U.S. at 634 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)). See also *Pacific Gas & Elec.*, 461 U.S. at 212 (state regulation of nuclear power plant safety is not preempted “only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”) (labeled dictum by the concurring justices). The comparisons to the field of merchant vessels, documented and inspected by the Coast Guard, operated by persons tested and licensed by the Coast Guard, and often under the control of a vessel traffic service similar in many respects to air traffic control, is apparent.

²³⁹See *Hillsborough*, 471 U.S. at 718, and *California v. Zook*, 336 U.S. 725, 737 (1949) (observing that “one would expect the agency to be specific if it intended to supersede state laws.”).

²⁴⁰*Id.* See also *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987) (agency regulations did not preempt state regulatory authority where they did not specifically express preemptive intent).

²⁴¹See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607, 609–10 & n.4 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978).

²⁴²See *Savage v. Jones*, 225 U.S. 501, 533 (1912).

²⁴³*Mortier*, 501 U.S. at 605.

²⁴⁴*Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (leaving open the question whether “the federal power in this field, whether exercised or unexercised, is exclusive.”); *Mortier*, 501 U.S. at 605; *Hillsborough*, 471 U.S. at 719.

²⁴⁵See *Mortier*, 501 U.S. at 604–05 (internal quotation marks and citations omitted), and *Pacific Gas & Elec.*, 461 U.S. at 204 (citations omitted).

a source of mischief in conflicts of law questions in private law,²⁴⁶ determining the "subject" or "purpose" of federal and state law in a preemption analysis can prove vexing.²⁴⁷ Nonetheless, such a determination is essential under traditional preemption analysis. In classifying federal legislation for preemption analysis the Court has variously referred to the legislation's "subject,"²⁴⁸ its "matter,"²⁴⁹ the "subject matter,"²⁵⁰ the "field," the "area,"²⁵¹ and its "purpose."²⁵² Unlike state legislation, which in most states may not constitutionally embrace more than one subject or object,²⁵³ federal legislation often does. The Oil Pollution Act of 1990 (which will be discussed in Part II of this article) is a noteworthy example of a federal act with multiple subjects and purposes. Few would dispute that characterizing

²⁴⁶E. Scoles & P. Hay, *Conflicts of Law* § 3.5, at 55 (2d ed. 1992) (observing that characterization is sometimes used in choice of law analysis as a "gimmick" to get around undesirable results). In his concurring opinion in *American Dredging*, Justice Souter accepts the majority's "substantive-procedural" characterization in determining whether the application of state law will disrupt the harmony and uniformity of the general maritime law, but points out that "[a]s to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce." *American Dredging Co. v. Miller*, 510 U.S. 443, 458, 1994 AMC 913 (1994) (Souter, J., concurring).

²⁴⁷See *Hines*, 312 U.S. at 78–79 (Stone, J., dissenting) ("Every act of Congress occupies *some field*, but we must know the *boundaries of that field* before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.") (emphasis added). Problems with characterization in the context of a dormant Commerce Clause analysis are discussed in G. Gunther & K. Sullivan, *Constitutional Law* 337–38 (13th ed. 1997).

²⁴⁸See *Hines*, 312 U.S. at 61 ("the basic *subject* of the state and federal laws is identical") (emphasis added), and *Southern Ry. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439, 446, 448 (1915) (the exclusive effect of the federal statute "did not relate merely to the details of the statute and the penalties it imposed, but extended to the whole *subject* of equipping cars with appliances intended for the protection of employees.") (emphasis added).

²⁴⁹*Rice*, 331 U.S. at 235 (the test is "whether the *matter* on which the State asserts the right to act is in any way regulated by the Federal Act.") (emphasis added).

²⁵⁰*Charleston & W. Cent. Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915) (per Holmes, J.) ("When Congress has taken the particular *subject-matter* in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go.") (emphasis added).

²⁵¹*Hillsborough*, 471 U.S. at 712 ("even where Congress has not completely displaced state regulation in a specific *area*. . .") (emphasis added).

²⁵²*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("it is suggested that whether the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent.") (emphasis in original). Shifting the focus, the Court in the same opinion later held:

The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different *objectives*.

Id. at 142 (emphasis added). In its next substantive section, however, the Court focused its attention on the "nature of the subject matter." Id. at 143.

²⁵³See 1A Singer, *supra* note 216, at § 17.01 ("41 state constitutions provide that an act shall not embrace more than one subject or object.").

the subject or purpose of an entire title of the United States Code which has been enacted into positive law, such as the Title 46 (or, even worse, Title 33), is likely to generate disagreement.²⁵⁴ The Supreme Court has offered some guidance on the importance of the legislation's "subject" or "object" in *Ray v. Atlantic Richfield Co.*²⁵⁵ In examining its prior cases which upheld state regulation of vessels that had been inspected and found to be in compliance with federal safety regulations the Court noted that

in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the *object* also sought to be addressed by the challenged state regulations.²⁵⁶

The Court went on to point out that in its decision in *Huron Portland Cement Co. v. City of Detroit* the majority opinion had "made it plain that there was no overlap between the scope of the federal inspection laws and that of the municipal ordinances."²⁵⁷ In reaching its conclusion that the federal and state statutes did not overlap the Court in *Huron* focused on the *purpose* of the statutes.²⁵⁸ Similarly, the Court noted that, in upholding the state motor tugboat safety regulations at issue in *Kelly v. Washington ex rel. Foss Co.*, the Court concluded that the state regulations addressed matters (a class of vessels) not touched by federal regulations.²⁵⁹ Such was not the case in the Tanker Law at issue in *Ray*. In *Ray* the Court found that the federal scheme aims "precisely at the same *ends* as does" the Washington statute.²⁶⁰ The Court's focus on the purpose of the legislation was reaffirmed in *Medtronic, Inc. v. Lohr*, in which the Court noted that "the *purpose* of Congress is the ultimate touchstone in every pre-emption case."²⁶¹ To determine the purpose or intent of Congress the court looks to the text of the statute, the framework

²⁵⁴The effect of code titles enacted into positive law is analyzed in *Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438 (D.C. Cir. 1988).

²⁵⁵435 U.S. 151, 1978 AMC 527 (1978).

²⁵⁶*Id.* at 164 (emphasis added). See also *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941) ("the basic subject of the state and federal act is identical"), and *New York v. Compagnie Generale Transatlantique*, 107 U.S. (17 Otto) 59, 63 (1883) (where state and federal law cover the same ground state law must yield).

²⁵⁷*Ray*, 435 U.S. at 164 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446, 1960 AMC 1549 (1960)) (internal quotation marks omitted). In their dissent in *Huron*, Justices Frankfurter and Douglas disagreed in the majority's conclusion that there was no overlap. See 362 U.S. at 449 (Frankfurter & Douglas, JJ., dissenting).

²⁵⁸*Ray*, 435 U.S. at 164.

²⁵⁹*Id.* at 164-65. The Court noted that the state was therefore "[r]efusing to accept the federal judgment" that vessels which met the federal requirements were safe by attempting to exclude those vessels from state waters. *Id.* at 165.

²⁶⁰*Id.* at 165 (emphasis added).

²⁶¹116 S. Ct. 2240, 2250 (1996) (internal quotation marks and citations omitted and emphasis added).

surrounding it, and the court's understanding of the way in which Congress intended the statute and its associated regulatory scheme to affect business and the law.²⁶²

State laws intended to supplement federal law by creating new or more stringent requirements than those established by federal law are preempted if federal law occupies the field.²⁶³ If the federal government occupies a given field or an identifiable portion of it the test of preemption is whether the matter on which the state asserts the right to act is "in any way regulated by the Federal Act."²⁶⁴ Moreover, even if the state legislation is fully consistent with federal law, the Court may hold that state authority is preempted if the state's act intrudes on foreign commerce.²⁶⁵ When the federal government has enacted a complete scheme of regulation the "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."²⁶⁶ If federal law occupies a given field, state laws on the same subject are preempted even before the effective date of the federal regulations.²⁶⁷ And a federal decision to forgo regulation on a given subject may imply a federal determination that the subject is best left unregulated, in which case the states are preempted from imposing their own regulations on the subject.²⁶⁸ Applying its preemption formula the Supreme Court struck down a Georgia statute which, for safety reasons, required railroad locomotives to have automatic doors on the fire boxes, on the ground that federal legislation had occupied the field of railroad safety.²⁶⁹ Later decisions by the Court held that the federal government has occupied the field of common

²⁶²Id. (internal quotation marks and citations omitted).

²⁶³See *Campbell v. Hussey*, 368 U.S. 297 (1961) (holding that when Congress has preempted the field, "complementary state legislation is as fatal as state regulations which conflict with the federal scheme.").

²⁶⁴*Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (citations and internal quotation marks omitted). In that case the Court concluded that federal law completely occupied the field of nuclear power plant safety, but that a state could nevertheless ban nuclear plants if it had a non-safety rationale for doing so. Id. at 216. If the state had a non-safety rationale, the state legislation was held to be outside the occupied field of nuclear safety regulation. Id.

²⁶⁵See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984) ("The need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government, enhances the necessity that congressional authorization not be lightly implied.").

²⁶⁶*Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

²⁶⁷See *Erie R. Co. v. New York*, 233 U.S. 671 (1914).

²⁶⁸See *Arkansas Elec. Co-op Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983).

²⁶⁹*Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926). Justice Brandeis wrote the opinion for a unanimous Court. Later, he would report in a letter to Justice Frankfurter that he had "endeavored in the opinion to make the 'occupying the field' doctrine clear as a matter of statutory construction." Letter from Louis Brandeis to Felix Frankfurter (Nov. 30, 1926), reprinted in 5 *Letters of Louis D. Brandeis* 247 (M. Urofsky & D. Levy eds. 1975).

carrier liability,²⁷⁰ regulation of air carriers,²⁷¹ nuclear power plant safety,²⁷² and construction and design requirements and safety standards for tank vessels.²⁷³

Congress may limit the preemptive effect of federal legislation by inserting state law saving clauses into its statutes.²⁷⁴ Such saving clauses are now common,²⁷⁵ though they are not always models of clarity. As with statutory preemption provisions, saving clauses often require the court to determine the "domain" covered; that is, the scope of the state law which Congress intended to save.²⁷⁶ Generally, saving clauses are strictly construed.²⁷⁷ In *Offshore Logistics, Inc. v. Tallentire*,²⁷⁸ one of the leading admiralty decisions construing the Death on the High Sea Act, the Supreme Court read the state law saving clause in that statute narrowly; in the words of one commentator "torturing" the clause to "save" the statute.²⁷⁹ Similarly, in its 1976 decision in *Oil, Chemical & Atomic Workers, International Union v. Mobil Oil Corp.*,²⁸⁰ which involved a challenge to application of a Texas right-to-work statute to tankers operating on the high seas off the Texas coast, the Court narrowly construed the saving clause in federal labor laws, thus limiting application of state law.²⁸¹

c. Conflict Supersession

If a court determines that relevant federal laws do not expressly or impliedly preempt state authority, it will next look at whether the state law

²⁷⁰See *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913) (holding that the Carmack Amendment, as national law, is paramount to and supersedes all state laws as to the rights and liabilities of carriers).

²⁷¹See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226–27 (1995), and *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973).

²⁷²See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983) (citations and internal quotation marks omitted).

²⁷³See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163–64, 174 1978 AMC 527 (1978).

²⁷⁴See 1A Sutherland, *supra* note 216, § 20.22, at 110 ("The saving clause is said to preserve from destruction certain rights, remedies or privileges which would otherwise be destroyed by the general enactment.") (citations omitted). See also *id.* at § 21.12 (saving clauses are generally employed to restrict repealing acts).

²⁷⁵See J. Nowak & R. Rotunda, *Constitutional Law* § 9.1, at 319 (5th ed. 1995).

²⁷⁶*Cf. Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2243 (1996) (court must "identify the domain expressly preempted" by the preemption clause) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)).

²⁷⁷See 1A Singer, *supra* note 216, § 20.22, at 110 (citations omitted).

²⁷⁸477 U.S. 207, 1986 AMC 2113 (1986).

²⁷⁹Ruhl, *Finding Federalism in the Admiralty: "The Devil's Own Mess" Revisited*, 12 Tul. Mar. L.J. 263, 286–90 (1988).

²⁸⁰426 U.S. 407 (1976).

²⁸¹The saving clause at issue was in 29 U.S.C. § 158(a)(3), which expressly allowed "agency shop" agreements, and 29 U.S.C. § 164(b).

under challenge actually conflicts with a valid federal statute, treaty, or federal agency-promulgated regulation.²⁸² If the state law frustrates the accomplishment and execution of the full purposes and objectives of Congress,²⁸³ or if it is impossible to comply with both state and federal laws at the same time,²⁸⁴ the state law will be held to conflict with federal law, and will thus be invalidated by operation of the Supremacy Clause.²⁸⁵ A state statute may also be held to be preempted by federal law when the incompatibility between them is discernible only through inference.²⁸⁶

In conducting a conflict analysis the court must consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.²⁸⁷ If the state act prevents or hinders the federal act from operating as Congress intended, the state law will be held to be in conflict with the federal law and therefore superseded.²⁸⁸ In cases conducting an analysis into a potential conflict between the federal and state law, the courts do not apply the presumption against preemption relevant in implied preemption analyses.²⁸⁹ Where the federal statute establishes a "regulatory partnership between federal, state, and local governments," the Court is less likely to find that the state regulation frustrates the purposes and objectives of the federal law.²⁹⁰ Although the danger of a conflict between enforcement of state laws and the administration of the federal program has persuaded the Court to invalidate state law in some circumstances,²⁹¹ the Court is reluctant to imagine possible conflicts not presented in the case,²⁹² or to entertain arguments concerning speculative conflicts.²⁹³

²⁸²Cf. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978).

²⁸³See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), and *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the federal Alien Registration Act preempts state regulation of aliens).

²⁸⁴See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

²⁸⁵See *id.*

²⁸⁶See *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir.), cert. denied, 506 U.S. 1013 (1992) (citing *Hayfield Northern R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 626-28 (1984)).

²⁸⁷See *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (citations omitted).

²⁸⁸See *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1997 AMC 1921 (11th Cir.), cert. granted, 118 S.Ct. 439 (1997).

²⁸⁹See *id.* (citation omitted).

²⁹⁰*Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 614-15 (1991).

²⁹¹See *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956).

²⁹²See *California v. Zook*, 336 U.S. 725, 736 (1949) (declining to predicate its decision on "Constitutional difficulties not present in the cause before us"), and *Barber v. Hawai'i*, 42 F.3d 1185, 1189, 1995 AMC 1763 (9th Cir. 1994) ("We will consider future conflicts as they arise. . .").

²⁹³See *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 722 (1985), and *Goldstein v. California*, 412 U.S. 546, 554 (1973).

d. Preemption by Federal Maritime Law

Congress has highlighted the nation's "long history of preemption in maritime safety matters . . . founded on the need for uniformity applicable to vessels moving in interstate commerce."²⁹⁴ The constitutional limits on state regulatory authority over merchant vessel safety and pollution prevention parallel the limits on the application of state law in private law cases arising under the federal Admiralty and Maritime Jurisdiction Clause.²⁹⁵ In *Southern Pacific Co. v. Jensen*, the seminal case establishing the rule of uniformity in private admiralty litigation, the Supreme Court acknowledged the origins of its holding in the Court's Commerce Clause jurisprudence under *Cooley*.²⁹⁶ Although a majority of the current members of the Court seem ready to overrule *Jensen* in a proper case,²⁹⁷ even Justice Stevens, the most outspoken critic of *Jensen* on the present Court, has stated his continuing allegiance to an approach to maritime federalism which scrutinizes the application of state law in admiralty cases under the dormant Commerce Clause doctrine.²⁹⁸ A review of the leading Commerce Clause and Admiralty Clause choice of law cases demonstrates that the public policy goal underlying the Constitution's delegation of both subject areas to the national government is virtually identical: the national interest in providing the needed degree of uniformity in laws governing foreign and

²⁹⁴S. Rep. No. 92-248 (1971), reprinted in 1971 U.S.C.C.A.N. at 1341.

²⁹⁵The Third Circuit noted in *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 629 n.8, 1995 AMC 1 (3d Cir. 1994), *aff'd*, 516 U.S. 199, 1996 AMC 305 (1996), that the analogy is not perfect. In the private admiralty and maritime law area, the Supreme Court has twice held that Congress may not constitutionally delegate its legislative responsibilities to the states, as it can under the Commerce Clause. Compare *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-64 (1920), and *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227-28, 1924 AMC 403 (1924) (both holding that Congress may not delegate its legislative authority over maritime law to the states) with *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (holding that "[i]t is well established that Congress may authorize States to engage in regulation that the Commerce Clause would otherwise forbid"). As earlier discussed, the Court may find state authority preempted with respect to safety regulations, but not with respect to tort liability. See *supra* note 210 (contrasting the Court's decisions in *Pacific Gas & Electric* and *Silkwood*).

²⁹⁶244 U.S. 205, 216-17, 1996 AMC 2076 (1917) (explaining that a "similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established . . . [a]nd the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved.") (citations omitted).

²⁹⁷See *American Dredging Co. v. Miller*, 510 U.S. 443, 447 n.1, 1994 AMC 913 (1994) ("we think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation.").

²⁹⁸*Id.* at 441-42 (Stevens, J., concurring) ("we should recognize that, today, the federal interests in free trade and uniformity are amply protected by" means other than the *Jensen* maritime preemption analysis . . . "state laws that affect maritime commerce, interstate and foreign, are subject to judicial scrutiny under the Commerce Clause."). Justice Souter expressed a similar concern that the preemption analysis should turn on whether application of state law would unduly interfere with the federal interest in maintaining the free flow of maritime commerce. *Id.* at 458.

interstate trade and transportation.²⁹⁹ In examining the roots of the federal admiralty jurisdiction, Justice Story quoted Federalist No. 80, which argued that maritime cases “so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”³⁰⁰ Later, he noted that “this class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity.”³⁰¹

The federal power over admiralty and maritime matters is said to be exclusive in all cases where the federal interest in promoting maritime shipping and commerce requires a uniform national system, plan, or regulation—even if Congress has not spoken.³⁰² Accordingly, state laws affecting admiralty and maritime matters, even where not in conflict with federal law, will be struck down if the law concerns a subject matter which demands a uniform national rule. In contrast, the Court will generally uphold state legislation if the state was exercising its inherent police power over a subject matter that is “maritime but local”;³⁰³ that is, over a matter that does not require a uniform national rule, but rather is better suited to multiple

²⁹⁹The Court’s historical position is articulated in *W.C. Dawson & Co.*, 264 U.S. at 228, in which the Court struck down a state statute while observing:

The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.

See also *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 15, 1937 AMC 1490 (1937) (expressing concern for varying state regulations of vessel safety). Two recent opinions from the Court cast doubt on the extent to which concern for maritime commerce lies at the heart of federal admiralty jurisdiction and choice of law. See *American Dredging*, 510 U.S. at 452 n.3 (“Whatever might be the unifying theme of [the federal-state choice of law] aspect of our admiralty jurisprudence, it assuredly is not what the dissent takes it to be, namely, the principle that the States may not impair maritime commerce.”) (emphasis in original). Justice Scalia, writing for the Court, goes on to point out that the “no-harm-to-commerce theme” is part of the “negative Commerce Clause jurisprudence.” *Id.* See also *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546–47 n.6, 1995 AMC 913 (1995) (“It is true that this Court has said that ‘the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce . . . [h]owever that may be, this Court has never limited the interest in question to the ‘protection of maritime commerce through uniform rules of decision.’”) (citations omitted).

³⁰⁰The Federalist No. 80 (Alexander Hamilton).

³⁰¹Story, *supra* note 48, at § 1664.

³⁰²See *Kelly*, 302 U.S. at 14–15, and *Harman v. City of Chicago*, 147 U.S. 396 (1893).

³⁰³See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973), and *Palestina v. Fernandez*, 701 F.2d 438, 1984 AMC 910 (5th Cir. 1983).

rules adapted to local necessities. The interest in uniformity is greater when the activities regulated occur on the high seas.³⁰⁴

e. Preemption by International Law

Article VI of the Constitution imbues treaties with preemptive "law of the land" status.³⁰⁵ International law sources other than treaties are accorded similar status under the Court's construction of Article VI. Such sources include international agreements entered into by the President and international law established other than by treaty.³⁰⁶ Arguably, Article VI also extends to established practices by the United States government based not on an obligation imposed by treaty or other international law but rather those founded on principles of international comity.³⁰⁷

Customary international law, or "the law of nations," is part of the law of the land in the United States.³⁰⁸ It is self-executing and ordinarily does not require implementation by Congress.³⁰⁹ Within the United States federal courts determine the content and effect of international law and their decisions are binding on state courts.³¹⁰ The courts go about their law-

³⁰⁴See *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 492 n.2, 1984 AMC 1027 (9th Cir. 1984), cert. denied, 471 U.S. 1140, 1985 AMC 2395 (1985).

³⁰⁵See Restatement, *supra* note 19, at § 111 n.2. Benjamin Franklin was responsible for adding the phrase "or any treaties subsisting under the authority of the Union" to the draft supremacy clause which eventually formed Article VI. See Madison, *supra* note 62, Thursday, May 31, 1787, at 44.

³⁰⁶In describing the content of the "foreign relations law" of the United States, the Restatement includes international agreements and international law. "International law," in turn, includes customary international law and widely accepted multi-lateral agreements. See Restatement, *supra* note 19, at introductory note to Chapter 2.

³⁰⁷*Id.* at § 101 cmt. e. Comity is neither a matter of absolute obligation nor of mere courtesy and good will. It is the recognition that one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Without identifying the principle of comity by name, District Judge Charles L. Briant recently described it succinctly. "Each nation which considered itself a maritime power understood that it had to treat traders fairly because some day its own ships would be under arrest in the ports of those traders." Briant, *Professionalism, Civility, and the Maritime Bar: A View From the Bench*, 28 J. Mar. L. & Com. 551, 552 (1997).

³⁰⁸See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination."); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.); Restatement, *supra* note 19, at § 111(1). But see Bradley & Goldsmith, *Customary International Law as Federal Law*, 110 Harv. L. Rev. 815, 849-70 (1997) (criticizing the "modern position" that customary international law is "federal law").

³⁰⁹*Foreign Affairs*, *supra* note 67, at 236.

³¹⁰See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-27 (1964). But see Bradley & Goldsmith, *supra* note 308, at 870 (arguing that federal court decisions on customary international law are not binding on the states or on the legislative and executive branches). Federal question jurisdiction under 28 U.S.C. § 1331 extends to questions of international law. See Restatement, *supra* note 19, at § 111(2) & cmts. d & e. Where, however, the United States Supreme Court has not spoken on a subject,

finding process by, among other means, "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."³¹¹ International agreements entered into by the President without the advice and consent of the Senate have been upheld,³¹² and such agreements preempt state law to the same extent as would a treaty, without regard to whether they are self-executing.³¹³ Indeed, international law and even some acts of Congress do not distinguish between treaties and executive agreements.³¹⁴

In contrast to customary international law and executive agreements, the preemptive force of which does not require a determination of whether they are self-executing, the preemptive force of a treaty in United States domestic law may turn on such a determination. A self-executing treaty, when proclaimed, or a non-self-executing treaty, when implemented by an act of Congress, is federal law and supersedes state law.³¹⁵ Self-executing treaties are "law of the land" without further legislation.³¹⁶ Treaties which are not self-executing do not become law of the land unless implemented by the legislative or executive branches. Interestingly, in at least one circumstance, a treaty affecting maritime matters was implemented by the Supreme Court by incorporating the treaty into the general maritime law. In *Warren v. United States*, the Supreme Court enforced provisions of the Shipowner's Liability Convention³¹⁷ notwithstanding Congress's failure to act.³¹⁸ The Court's recognition of the unique relationship between international mari-

state courts arguably are not obliged to follow lower court opinions. See *id.* at § 112 cmt. a, and *Foreign Affairs*, *supra* note 67, at 409 n.17.

³¹¹See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820), and *Restatement*, *supra* note 19, at §§ 102, 103 & 112.

³¹²See *Dames & Moore v. Regan*, 453 U.S. 654, 682 (1981); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Restatement*, *supra* note 19, at § 303(2)-(4) & cmt. a & illus. 1. Such Executive Agreements must be transmitted to the Congress within 60 days. See 1 U.S.C. § 112b and 22 C.F.R. pt. 181 (1997). The criteria followed by the Department of State in determining which form of international agreement is appropriate for a given subject are listed in 11 *Foreign Relations Manual* 720 (Dep't State 1985).

³¹³See *Belmont*, 301 U.S. at 330–331; *Curtiss-Wright Export*, 315 U.S. at 230–32; *Aerovias Inter-Americanas de Panama, S.A. v. Board of County Comm'ners of Dade County*, 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963); *Restatement*, *supra* note 19, at §§ 111, 144(1).

³¹⁴*Cf. Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 & 30–31 (1982).

³¹⁵See *Foreign Affairs*, *supra* note 67, at 476 n.95. See also *Answers of the Maritime Law Association of the United States to the Comité Maritime International's Questionnaire on Implementation of International Conventions*, reprinted in 18 *J. Mar. L. & Com.* 589 (1987).

³¹⁶See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). A self-executing treaty is applicable as federal law *ex proprio vigore*.

³¹⁷54 Stat. 1693 (Sept. 29, 1939).

³¹⁸See 340 U.S. 523, 1951 AMC 416 (1951) (holding that relevant treaty provisions are "operative by virtue of maritime law and that no Act of Congress is necessary to give them force.").

time conventions and the general maritime law was reaffirmed in 1975 in *Vella v. Ford Motor Company*.³¹⁹

The importance of whether a treaty is self-executing in an analysis of the treaty's preemptive effect was first established by the Supreme Court in *Foster v. Neilson*.³²⁰ In that case, Chief Justice Marshall acknowledged that under Article VI treaties are the law of the land, and that a treaty is to be regarded by the courts as equivalent to an act of the legislature whenever it operates on its own force without the aid of implementing legislation.³²¹ Absent implementing legislation by Congress, however, a treaty that is not self-executing "addresses itself to the political, not the judicial department,"³²² and is therefore not enforceable in court. Generally, it is up to the offended nation to protest treaty violations: if there is no claim from the signatory nation to a treaty, a private person from that nation lacks standing to challenge the actions of another party.³²³

The standard for determining whether a treaty is self-executing is unsettled; however, a number of guiding principles have emerged.³²⁴ There

³¹⁹421 U.S. 1, 1975 AMC 563 (1975) (holding that the United States has an international obligation to enforce the treaty).

³²⁰27 U.S. (2 Pet.) 253 (1829), overruled in part by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833). Although *Neilson* was overruled on its application to the specific treaty at issue, the Supreme Court preserved the definition of self-executing treaties under United States law. See Restatement, supra note 19, at § 111(3) & n.5.

³²¹See 27 U.S. at 314; Riesenfeld, *The Doctrine of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995); L. Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 66 (1990) [hereinafter *Constitutionalism*] (criticizing the modern trend to interpret treaties as non-self-executing). See also Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995). But see Baghdadi, *Apples and Oranges—The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez*, 20 Hastings Int'l & Comp. L. Rev. 701, 702 (1997) (criticizing Vazquez's conclusion that a treaty that is not self-executing cannot preempt state law). In its ruling on *Intertanko's* preemption challenge, the district court held that "[a] treaty cannot [] have any impact on domestic laws unless it is self-executing, or unless its terms are enacted as parts of statutes or administrative regulations." *International Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1490 n.3, 1997 AMC 512 (W.D. Wash. 1996), appeal docketed sub. nom. *International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke* (9th Cir. No. 97-35010) (citation omitted). In its appeal, the United States Department of Justice has taken the position that whether a treaty is self-executing "is not relevant to whether the treaty has the negative effect of preempting inconsistent state law." Reply Brief for Intervenor-Appellant United States, *International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke*, at 28 (9th Cir. No. 97-35010). Both may be right. The United States was not a party in the case in the district court. It intervened only on appeal. The position of *Intertanko*, as a private litigant in the court below, is arguably constrained by the rule articulated by the district court. By contrast, the Executive Branch may challenge a state statute on the ground that it is displaced by an international agreement to which the United States is party without regard to whether the agreement is self-executing.

³²²*Neilson*, 27 U.S. at 314.

³²³See *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988).

³²⁴See generally 1A Singer, supra note 216, § 32.01, at 552, and Restatement, supra note 19, at § 111(4).

is a strong presumption that any given treaty is self-executing.³²⁵ That a treaty is self-executing may be apparent from the text.³²⁶ The intent of the parties to the treaty will also be considered. Within the United States, the understanding and intent of the President and the Senate in entering into the treaty is a key factor in determining whether a treaty to which the United States is party is self-executing. If the President does not request that Congress enact legislation implementing a treaty, and Congress has not enacted such legislation, there is a presumption that the treaty has been considered self-executing by the political branches, and that it should therefore be considered self-executing by the courts.³²⁷ Agreements which can readily be given effect by executive or judicial bodies without further legislation are deemed self-executing unless a contrary intention is manifest.³²⁸ Obligations imposed by a treaty to refrain from an act, or to act only subject to limitations, are generally deemed self-executing.³²⁹ Thus if the terms of the treaty declare rules which limit the actions of the signatory nations, those limiting provisions are subject to judicial enforcement.³³⁰ Finally, even an international agreement by the United States which is not self-executing may give rise to a preemption challenge if a state regulation interferes with the foreign policy of the United States, as reflected in the international agreement. State laws which would frustrate the objectives underlying an international agreement to which the United States is party are preempted.³³¹ The effect to be given such international agreements turns on the "purposes and objectives" of the national government in entering into the international agreements.³³²

Because treaties to which the United States is party are not only the

³²⁵See Foreign Affairs, *supra* note 67, at 201.

³²⁶See, e.g., United Nations Convention on Contracts for the International Sales of Goods, entered into force Jan. 1, 1988, U.N. Doc. A/CONF.97/18 (1980).

³²⁷See Restatement, *supra* note 19, at § 111 n.5.

³²⁸See *id.*

³²⁹See *Commonwealth v. Hawes*, 76 Ky. 697, 702-03 (1878), cited by the Supreme Court as a "very able" statement of the law in *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886). But see *United States v. Postal*, 589 F.2d 862, 1980 AMC 1651 (5th Cir.), cert. denied, 444 U.S. 832 (1979). In *Postal*, the Fifth Circuit held that Article 6 of the Convention on the High Seas, which limits boarding authority by nations other than the flag State while the vessel is on the high seas, was not self-executing. Accordingly, it was not a defense in a criminal trial in federal court for conspiracy to import marijuana that the court lacked jurisdiction over the defendants on the grounds that the boarding leading to their arrest was made in violation of Article 6. The decision has been criticized. See Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 Am. J. Int'l L. 892 (1980), and Note, *United States v. Postal: Lost on the High Seas*, 31 Mercer L. Rev. 1081 (1980).

³³⁰See *United States v. Decker*, 600 F.2d 733 (9th Cir.), cert. denied, 444 U.S. 855 (1979), and *Watson v. United States*, 592 F. Supp. 701 (W.D. Wash. 1983).

³³¹See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 68, 1993 AMC 2318 (1993) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

³³²See *id.* at 69-70.

supreme law of the land, but also an agreement among sovereign powers, the court in construing a treaty considers its text, drafting history (*travaux préparatoires*), and the post-ratification understanding of the contracting parties.³³³ And in interpreting treaties the federal courts will attempt to determine and enforce the intent of the parties.³³⁴ However, in analyzing whether international agreements evince a policy with which a state regulation arguably interferes, a court will look not at the "aspirations" contained in the treaties, but the law actually established by those treaties.³³⁵ An interpretation of a treaty by the political branches of the government is not conclusive, but the courts accord such determinations due weight.³³⁶

No fixed formula yet exists for determining the circumstances under which state law will be displaced by an international agreement.³³⁷ In conducting its preemption analysis of state regulation touching on international relations, the Court has held that any concurrent power the states may have in the field of foreign affairs "is restricted to its narrowest limits."³³⁸ Where the federal government has exercised its authority on behalf of the nation as a whole, a state "cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities."³³⁹ Nor may a state attempt to add to or take from the force and effect of a treaty.³⁴⁰ State action will be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is, accordingly, of importance in any preemption analysis to determine whether the state legislation touches on a field which affects international relations, "the one

³³³See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 1996 AMC 319 (1996).

³³⁴See *Lemnitzer v. Philippine Airlines*, 783 F. Supp. 1238 (N.D. Cal. 1991).

³³⁵See *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 10 (1986) (examining a number of international agreements on civil aviation).

³³⁶See Restatement, *supra* note 19, at § 112 cmt. c; *Heilbronn v. Kendall*, 775 F. Supp. 1020 (W.D. Mich. 1991); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 195-96 (1983). The Court is not above rejecting the position of the Executive Branch. See, e.g., *Wardair*, 477 U.S. at 10-11 (rejecting the United States's argument that a "Resolution" of the International Civil Aviation Organization demonstrated a national policy to exempt aviation fuel from state taxes after observing that "the Resolution is formally merely the work product of an international organization of which the United States is a member; it has not been specifically endorsed, let alone signed, entered into, agreed upon, approved, or passed by either the Executive or Legislative Branch of the Federal Government. In other words, no action has been taken to give the Resolution the force of law.").

³³⁷*Id.*, 507 U.S. at 66-67.

³³⁸*Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

³³⁹*Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961).

³⁴⁰See *Hines*, 312 U.S. at 63. The Court explained that "our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference." *Id.*

aspect of our government that from the first has been most generally conceded to demand broad national authority.”³⁴¹

The leading Supreme Court decisions reviewing the validity of state laws affecting the nation’s foreign affairs often fail to make clear whether the Court’s holding was grounded on a finding of preemption by international law or on the Court’s perception that the state’s action interfered with the federal government’s exclusive power to conduct foreign affairs.³⁴² For example, in *United States v. Belmont*, the Court framed a preemption challenge as “a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government.”³⁴³ Five years later, in *United States v. Pink*,³⁴⁴ the Court repeated its concern over the impact of state laws on the national government’s ability to conduct foreign relations, urging that “if state laws and policies did not yield to the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters. If state action could defeat or alter our foreign policy, serious consequences might ensue.”³⁴⁵ Both cases highlight the close relationship between the need to give effect to international law and the conduct of the nation’s foreign affairs.

Treaties and federal statutes or regulations on the same subject but enacted at different times present questions regarding which of those authorities constitutes the current “law of the land.” Courts begin with the maxim that acts of Congress should not be construed to conflict with the nation’s international treaty obligations.³⁴⁶ For purposes of *domestic* law, a statute can supersede a treaty and a self-executing treaty can repeal an earlier statute.³⁴⁷ The relationship between international agreements and federal statutes was defined by the Supreme Court in a series of decisions beginning with *Edye v. Robertson*.³⁴⁸ In that decision the Court held that a treaty’s incorporation into the domestic laws of the United States is subject to

³⁴¹Id. at 67–68.

³⁴²In *Zschernig v. Miller*, 389 U.S. 429 (1968), for example, the Court was called upon to determine whether Oregon’s application of its escheat statute to an East German heir conflicted with the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany. Particularly troubling to Justice Douglas, who wrote the opinion for the plurality, was the fact that various states had “launched inquiries into the type of governments that obtain in particular foreign nations.” Id. at 433–34.

³⁴³301 U.S. 324, 327 (1937).

³⁴⁴315 U.S. 203 (1942).

³⁴⁵Id. at 232.

³⁴⁶See *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996).

³⁴⁷This follows the principle of *lex posterior derogat prior*. See *Foreign Affairs*, *supra* note 67, at 96.

³⁴⁸112 U.S. 580 (1884).

subsequent modification or supersession by Congress.³⁴⁹ The principle was best stated by the Court in *Whitney v. Robertson*:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other, when the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.³⁵⁰

Thus Congress can, by subsequently-enacted legislation, override the effect of an international agreement in United States domestic law, but the courts will not infer such an intent. Rather, such intent must be clearly expressed. For example, in *Cook v. United States*,³⁵¹ the Court construed a statutory provision for boarding vessels which had been enacted after a series of liquor treaties with Great Britain. Finding no express intent in the statute to supersede the liquor treaties, the Court declined to find the treaties were superseded as a matter of domestic law.

In implementing a treaty Congress may provide for continued supremacy of United States domestic law by including appropriate provisions in the implementing legislation.³⁵² Conversely, the Court has established "a firm and obviously sound canon of construction" against finding implicit repeal of a treaty in ambiguous congressional action.³⁵³ Thus, legislative silence is not sufficient to abrogate the effect of a treaty on United States domestic law. No similar canon of construction operates to avoid possible conflict between a treaty and state legislation.³⁵⁴

³⁴⁹See *id.* at 599. The subsequent Congressional action does not, however, affect the United States's obligation under international law. See Restatement, *supra* note 19, at note 2 to the Preface and § 311(3) & cmt. c, and Vienna Convention on the Law of Treaties, *supra* note 221, at arts. 46 & 47.

³⁵⁰124 U.S. 190, 194 (1888). See also *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

³⁵¹288 U.S. 102 (1933).

³⁵²See, e.g., the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3512) (providing that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."). Such a statutory "supremacy clause" should, of course, be accompanied by the entry of a corresponding reservation to the underlying treaty or convention. See, e.g., the reservation of the United States to Article 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods (1980), 132 Cong. Rec. S15882 (daily ed. Oct. 10, 1986) (reservation against application of the Convention "when the rules of private international law lead to the application of the law of a Contracting State," as permitted under Article 95).

³⁵³*Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 1984 AMC 1817 (1984). See also Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103 (1990), and Fenton, *supra* note 66.

³⁵⁴See *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929).

Although the Supreme Court has created a presumption against preemption of state statutes grounded in the state's police powers,³⁵⁵ the Court has not applied the presumption in cases involving a conflict between a state statute and an international agreement.³⁵⁶ In *Missouri v. Holland*,³⁵⁷ the leading case on the preemptive effect of international agreements on state law, the Court never hinted that the state's laws were entitled to a presumption against preemption in the face of the treaty, even though the subject matter of the controversy (regulation of waterfowl hunting) fell squarely within the states's historic police powers. The Court has also adopted as a canon of construction the principle that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.³⁵⁸ The principle has been applied to avoid construing a statute in a manner contrary to State Department regulations or to established rules of international law.³⁵⁹

In examining the relationship between statutes and international agreements as they relate to United States domestic law, it is important to bear in mind the wholly distinct question of the nation's obligation as a matter of international law. Under international law every treaty in force is binding upon the parties to it and must be performed by them in good faith (the norm of *pacta sunt servanda*).³⁶⁰ A party may not invoke provisions of its internal, domestic law as a justification for failing to perform its treaty obligations.³⁶¹ Whether or not a treaty is considered self-executing has no effect on the United States' obligation under international law.³⁶² Recognizing that, notwithstanding the subsequent legislation, the United States will still be obliged under international law to abide by its treaty obligations, the Supreme Court has left such concerns to the executive and legislative branches of government.³⁶³

³⁵⁵See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978).

³⁵⁶See McGreal, *Some Rice with Your Chevron? Presumption and Deference in Regulatory Preemption*, 45 Case W. Res. L. Rev. 823 (1995).

³⁵⁷252 U.S. 416 (1920).

³⁵⁸See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Restatement*, *supra* note 19, at §§ 114–15. *The Charming Betsy* canon of construction has continued vitality. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting).

³⁵⁹See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21, 1963 AMC 283 (1963)).

³⁶⁰See *Vienna Convention on the Law of Treaties*, *supra* note 221, at art. 26.

³⁶¹See *id.* at art. 27, and *Greco-Bulgarian Communities*, 1930 P.C.I.J. Rep. ser. B, no. 17, at 32 (ruling that it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty). See also *Constitutionalism*, *supra* note 321, at 62–64.

³⁶²See *Vienna Convention on the Law of Treaties*, *supra* note 221, at arts. 26 & 27.

³⁶³See *Constitutionalism*, *supra* note 321, at 194–95.

C. Foreign Affairs Clause Limits on State Authority

The Supreme Court has long recognized that although governmental power over internal affairs is shared between the national and state governments, the power over external affairs is vested exclusively in the national government.³⁶⁴ As earlier discussed, the federal government's primacy in the conduct of the nation's foreign relations is maintained through several related doctrines. First, as a matter of constitutional competency, states and their subdivisions may not enter into treaties or alliances. Second, if a state law conflicts with a treaty, or undermines accomplishment of the full purposes and objectives of the federal government in entering into such an agreement, the state law must yield under the Supremacy Clause. Third, even in the absence of a treaty, a state's policy may disturb foreign relations,³⁶⁵ and therefore infringe on the exclusively federal domain.

State laws may be struck down as violative of the Foreign Affairs Clause even though they do not intrude on a field occupied by federal law or conflict with federal law.³⁶⁶ The Court will scrutinize state actions challenged under the Foreign Affairs Clause to determine whether they may have a direct impact upon foreign relations, or they could adversely affect the ability of the central government to deal with those problems.³⁶⁷ Similarly, the Court will scrutinize state actions which may impair the good faith of the United States in the eyes of a foreign government,³⁶⁸ or undermine the ability of the federal government to "speak with one voice" in its conduct of foreign affairs.³⁶⁹ For example, in response to a Foreign Affairs Clause challenge to the Washington Tanker Law at issue in *Ray v. Atlantic Richfield Co.*, the Supreme Court concluded that any state attempt to coerce foreign vessel owners to comply with state tanker design requirements might constitute an "invalid interference" with the Federal Government's attempt to achieve international agreement on the regulation of tanker design.³⁷⁰ Similarly, in reviewing Alaska regulations restricting the discharge of ballast water from tank vessels while in Alaskan waters, the Ninth Circuit acknowledged the necessity to consider whether the potential

³⁶⁴See *United States v. Belmont*, 301 U.S. 324, 330 (1937).

³⁶⁵See *Zschemig v. Miller*, 389 U.S. 429, 441 (1968). Professor Henkin warns that "[o]ne would be bold to predict that [Zschemig] has a future life. . . ." *Foreign Affairs*, supra note 67, at 165 n.**.

³⁶⁶*Zschemig*, 389 U.S. at 432.

³⁶⁷*Id.* at 441.

³⁶⁸See *Belmont*, 301 U.S. at 327.

³⁶⁹*Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 1979 AMC 881 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

³⁷⁰435 U.S. 151, 162-63, 1978 AMC 527 (1978).

effect of the challenged state statute on international matters gave rise to a “preemptive federal interest.”³⁷¹

State laws affecting foreign commerce may directly disrupt the nation’s foreign affairs. In *Container Corp. of America v. Franchise Tax Board*,³⁷² Justice Brennan, writing for a five member majority, identified as the most obvious foreign policy implication of a state tax on foreign commerce “the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole.”³⁷³ Although the majority in that case upheld the state tax on containers used to carry cargo on merchant vessels, Justice Powell, joined by Chief Justice Burger and Justice O’Connor, dissented on the ground that the tax “clearly violates the Foreign Affairs Clause.”³⁷⁴ Noting that the federal government had already received protests from its principal trading partners,³⁷⁵ the dissent expressed its concern for international retaliation.³⁷⁶

State actions which are likely to provoke retaliatory actions by a foreign nation raise serious foreign affairs powers questions—as the Founders well-knew. Whether state action undermines the foreign affairs of the nation is generally a question for the President and Congress, whose judgments are binding on the judiciary.³⁷⁷ In determining the validity of a state law affecting resident aliens, the Supreme Court observed that “[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrong to another’s subjects, inflicted, or permitted, by a government.”³⁷⁸ Real or imagined wrongs to a nation’s merchant vessels may provoke similar reactions. Concerns for the national government’s ability to defend the nation and conduct its foreign affairs informed the Court’s decision in *United States v. California*, in which the Court denied the state’s claim to the waters and submerged lands within the territorial sea.³⁷⁹ Even as Congress quitclaimed title to the submerged lands and waters of the territorial sea and the internal

³⁷¹*Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493, 1984 AMC 1027 (9th Cir. 1984), cert. denied, 471 U.S. 1140, 1985 AMC 2395 (1985).

³⁷²463 U.S. 159 (1983).

³⁷³*Id.* at 194 (citing *Japan Line*, 441 U.S. at 450).

³⁷⁴*Id.* at 197.

³⁷⁵*Id.* at 203 n.4.

³⁷⁶*Id.* at 203. The dissent also placed greater weight on the position of the Executive Branch than did the majority. Drawing from an amicus curiae brief filed by the Solicitor General in a similar case, the dissent concluded that the government’s position stated in the brief served as a substitute for a “clear federal directive” that the Federal Government was to speak with one voice. *Id.* at 204–05 & n.8.

³⁷⁷See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), and O’Connor, *Federalism of Free Nations*, in *International Law Decisions in National Courts* 14 (T. Franck & G. Fox eds. 1996) (quoting Justice Jackson in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

³⁷⁸*Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

³⁷⁹*United States v. California*, 332 U.S. 19 (1947) (grounding its decision on the belief that “[t]his

navigable waters, it retained for the federal government "paramount" rights in those waters for the purposes of commerce, navigation, national defense, and international affairs.³⁸⁰

The Foreign Affairs Clause may operate to limit state authority over foreign merchant vessels even where no established federal law controls if, in the exercise of its federal affairs powers, the national government accords privileges or favorable treatment to the vessels's flag State under the principle of international comity. Justice Sutherland, dissenting in *Cunard S.S. Co. v. Mellon*,³⁸¹ warned that the Court's decision in that case upholding application of the Eighteenth Amendment and the Volstead Act to foreign vessels voluntarily in United States ports violated "the principles of international comity, which exist between friendly nations." Similarly, in their dissent in *American Dredging Co. v. Miller*, Justices Kennedy and Thomas highlighted the principle of comity among nations as an objective that goes to the "vital center of the admiralty pre-emption doctrine."³⁸² They pointed out that "[c]omity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective trading partners would know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers from commerce."³⁸³ As will be discussed in Part II of this article, international comity and the desire to obtain favorable treatment for United States vessels on a reciprocal basis is a key factor in the United States's decision to accede to international standards for merchant vessels and to the limited port State control regime embodied in a number of international conventions.

country, throughout its existence, has stood for freedom of the seas, a principle whose breach has precipitated war among nations.").

³⁸⁰Submerged Lands Act, 43 U.S.C. §§ 1301-1314.

³⁸¹262 U.S. 100 (1923).

³⁸²510 U.S. 443, 466, 1994 AMC 913 (1994) (Kennedy & Thomas, JJ., dissenting) (citations omitted).

³⁸³*Id.*